TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 24

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ARABIE, PLAINTIFFS IN ERROR,

vs.

STATE OF LOUISIANA

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA

FILED JULY 24, 1926

(30,519)

(30,519)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 554

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ARABIE, PLAINTIFFS IN ERROR,

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STATE OF LOUISIANA

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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[fol. 1] **IN DISTRICT COURT OF JEFFERSON DAVIS PARISH**

MINUTE ENTRIES OF TRIAL

Monday, June 4th, 1923.

Court met according to adjournment. His Honor, Thos. F. Porter, Jr., Judge Presiding, with L. Z. Toups, Deputy Clerk of Court and J. H. Martin, Deputy Sheriff, in attendance.

Minutes of April 20, May 1, 12 and 21, 1923 read and approved.

This being the day fixed by law and by virtue of an order of his Honor, Thos. F. Porter, Jr., for the convening of the Grand Jury. The Grand Jury was called and all of said Grand Jurors answering to their names, the Grand Jury was further charged by the Court and thereupon retired to the Grand Jury Room for deliberations:

* * * * * * *

Into Court comes the Grand Jury — thru their foreman wishes to make the following report of their investigations and findings, to-wit: (Here follows report in full.)

No. 1329

STATE OF LOUISIANA

vs.

DORAS HERBERT

Charge: Manufacturing Intoxicating Liquor for Beverage Purposes.

A True Bill.

Wednesday, June 6th, A. D. 1923.

[Title omitted]

PLEA OF NOT GUILTY

To the bar comes, Doras Herbert, and personally and thru counsel, T. Arthur Edwards, Esq., waives formal arraignment and pleads not guilty.

On motion of the Asst. Dist. Atty. this case is fixed for Saturday, June 16, 1923.

Monday, June 11, 1923.

[Title omitted]

ORDER SETTING CAUSE

The Asst. Dist. Attorney being present in Open Court, as also the accused, Doras Hebert, with his counsel, T. Arthur Edwards, Esq., and personally and thru his Counsel, now withdraws his plea of not [fol. 2] guilty, and thru his Counsel now files Exception to the Jurisdiction of the Court. Exception Called. Argued and Submitted. Whereupon the Court overrules the Exception. To which ruling Counsel for Defendant excepts and reserves a bill.

Counsel for Defendant prays for a Bill of Particulars. Whereupon the Court grants the prayer for a Bill of Particulars in so far as Paragraphs "A & B" are concerned and orders that the District Attorney must set out where liquor was manufactured or possessed.

Counsel for Defendant excepts to that ruling which does not include all the particulars prayed for.

To the Bar comes, Doras Hebert, and personally and thru his Counsel, T. Arthur Edwards, Esq., waives formal arraignment and pleads not guilty.

On motion of the Assistant District Attorney, this case is fixed for Saturday, June 16, 1923.

Tuesday, June 12, 1923.

[Title omitted]

In the above numbered and entitled cause the Assistant District Attorney files answer to Prayer for Bill of Particulars.

Saturday, June 16, 1923.

[Title omitted]

SUBMISSION

The Assistant District Attorney being present in open Court, as also the accused, Doras Hebert, with his Counsel, T. Arthur Edwards, Esq., both sides announcing ready, the trial was proceeded with. Evidence adduced and closed. Case Submitted.

Whereupon the Court finds the accused guilty.

Friday, June 29, A. D. 1923.

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL

The Assistant District Attorney being present in Open Court, as [fol. 3] also the accused, Doras Hebert, with his Counsel, T. Arthur Edwards, Esq.

Counsel for defendant files motion for a New Trial. Motion Called, Argued and Submitted. Whereupon the Court overrules the Motion. To which ruling Counsel for defendant excepts and reserves a bill.

ORDER OVERRULING MOTION IN ARREST OF JUDGMENT

Counsel for defendant files motion in Arrest of Judgment. Motion Called, Argued and Submitted. Whereupon the Court overrules the motion. To which ruling Counsel for defendant excepts and reserves a bill.

SENTENCE

Whereupon the Court sentences the said Doras Hebert to pay a fine of five hundred dollars and costs and sixty days in jail and to six months' additional in jail in default of payment of fine.

ORDER ALLOWING APPEAL

Counsel for defendant moves for an appeal to the Supreme Court of Louisiana, returnable according to law.

Appeal is granted returnable to the Supreme Court of Louisiana, on or before July 30, A. D. 1923.

Defendant to be released, pending appeal, upon furnishing bond in the sum of fifteen hundred dollars.

CLERK'S CERTIFICATE

I hereby certify that the within and foregoing is a true and correct copy of the Minutes of Court entries as made in the hereinabove numbered and entitled cause, on the Criminal Docket of this Court.

Jennings, La., July 16th, A. D. 1923.

(Signed) L. Z. Toups, Chief Deputy Clerk of Court. (Seal.)

[fol. 4] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

BILL OF INDICTMENT—Filed June 4, 1923

In the name and by the authority of the State of Louisiana, the Grand Jurors of the State of Louisiana, duly empaneled, sworn and charged to inquire within and for the Parish of Jefferson Davis, State aforesaid, upon their oath do present, that—

Doras Hebert at the Parish of Jefferson Davis, on the 11 day of May, in the year of Our Lord, One Thousand Nine Hundred Twenty-three, did unlawfully, manufacture intoxicating liquor for beverage purposes; contrary to the form of the Statute of the State of Louisiana,

in such cases made and provided, in contempt of the authority of said State, and against the peace and dignity of the same.

(Signed) John J. Robira, Asst. District Attorney, Fifteenth Judicial District of Louisiana.

[File endorsement omitted.]

[fol. 5] In District Court of Jefferson Davis Parish

[Title omitted]

Stipulation re Facts—Filed June 11, 1923

It is admitted for the purposes of the Exception to Jurisdiction and plea in the above cause:

(1) That said defendant has been arrested and indicted in the United States District Court, Lake Charles Division, Western District of Louisiana, for the same crime, embracing the same dates and the same transaction; that he is now under bond for his appearance in said Court; that said arrest and indictment were prior to the indictment returned in the State Court.

(2) That said case in the United States District Court was fixed for trial for May 28, and the term of Court postponed, that said indictment in the Federal Court is still pending and said defendant awaiting trial.

(3) It is further admitted that said defendant has — yet been tried and convicted, or acquitted in the United States District Court.

[File endorsement omitted.]

[fol. 6] In District Court of Jefferson Davis Parish

[Title omitted]

Exception to Jurisdiction—Filed June 11, 1923

To the Honorable the Judges of said Court:

Now comes Doras Hebert, made defendant in the above entitled and numbered cause, and thru undersigned counsel, and subject to the reservations made to withdraw the plea herein which was made subject to his right to file any and all exceptions to the jurisdiction or otherwise of this Honorable Court, and withdraw his said plea in accordance with the leave of court granted, and respectfully shows:

1. That this Honorable Court is without jurisdiction to hear and determine the cause against him of manufacturing intoxicating

liquors and also without jurisdiction to try and determine the cause against him for the unlawful possession of intoxicating liquor, on the grounds and for the reasons following:

(a) Your defendant shows that he has already been indicted and placed under bond in the Federal Court for the Western District of Louisiana, for the same offense on the same date, and growing out of the same transaction, and for the same crime, as will appear from a true copy of Bill of Information filed by the U. S. District Attorney, and made part hereof, in the U. S. District Court for the Western District of Louisiana, Lake Charles Division, under the provisions of the XVIII Amendment of Federal Constitution and the National Prohibition Act.

(b) For the reason that Section Two of the XVIII Amendment to the Constitution of the U. S. of A. provides: "The Congress and several states shall have concurrent power to enforce this article by appropriate legislation;" and therefore the Federal Court having assumed jurisdiction of your defendant, and having arrested and indicted him for the crimes charged against him in the State Court, and said Federal Court, being a superior Court with Superior or equal powers in the enforcement of the liquor laws, or any violations [fol. 7] thereof having first been seized of jurisdiction, this Honorable Court is without jurisdiction to indict or to prosecute and try your defendant in the premises, or violate the rules of comity between said Courts.

(c) Because the powers conferred by the XVIII Amendment for the enforcement of said XVIII Amendment does not warrant a dual prosecution, or two prosecutions for the same crime, growing out of the same transaction, but is an authorization for the State Courts to act with the same authorization and power as the Federal Courts *to act with the same authorization and power as the Federal Court*, in conferring upon each of said courts "concurrent power to enforce this article"; does not warrant and authorize two prosecutions for the same crime on the same date, and under the same transaction, or state of facts.

(d) Because such procedure is in violation of the Bill of Rights of the Constitution of the State of Louisiana, under Article 1 Section 2 of said Article, Sections 6, 7 and 9 of said Article wherein it is provided that no person shall be twice put in jeopardy of life and liberty for the same offense; and under Article 4 of the Constitution of U. S. A. prohibiting unreasonable searches and seizures; and under Article 5 of said Federal Constitution, prohibiting any person from being placed in jeopardy twice for the same offense, and the 14th Amendment of the Constitution of the United States.

(e) And because said XVIII Amendment and the National Prohibition law under which your defendant has previously been indicted, guarantees to your defendant, a trial by a jury, and therefore your defendant specially excepts to the jurisdiction of this Honorable Court to try him on the charges preferred, and objects to any proceedings whatsoever in this court, because that Act 39 of 1921 is merely in aid of said XVIII Amendment, and Federal Legislation of the

subject of prohibition the manufacture, sale and possession and transporting of intoxicating liquors, and this court is without jurisdiction and without power beyond that conferred by said Section 2 of the [fol. 8] XVIII Amendment, granting to the states concurrent power by the Federal Courts, and not to the exclusion thereof, and the said Federal Courts, to-wit: The Lake Charles Division of the United States District Court, for the Western District of Louisiana, having previously, to-wit: On May 10, 1923, having arrested your defendant and placed him under bond before the U. S. Commissioner at Lake Charles, Louisiana, and subsequent thereof, to-wit: On or about the 21 day of May, 1921, having indicted your defendant for the offense just set out against him for the offenses and crime charged against him in this court, and still retaining jurisdiction and in which court your defendant is now under bond awaiting trial, said cases not having been dismissed, the action of the District Court of the State of Louisiana, in and for the Parish of Jefferson Davis is illegal, arbitrary and in violation of the Constitutional rights and immunities guaranteed to your defendant as hereinabove set forth or the terms and provisions of the Constitution of the United States of America and of the Constitution of the State of Louisiana, and your defendant is therefore entitled to have said charges dismissed and his bond cancelled.

2. Your defendant further avers in the alternative, in the event this court should decree that he is not entitled to a dismissal of the said charges, then and in that event, your defendant represents that for the reasons above assigned, he is entitled to an abatement and special plea withholding and restraining the prosecution of this case until a final determination thereof, by the Federal Court, or until after said Federal Court has surrendered its jurisdiction first assumed for the purpose of prosecuting and punishing your defendant for the same crime on the same date, for the same transaction charged in the indictment in the Honorable Fifteenth Judicial District Court of Louisiana.

Wherefore your defendant prays that this exception to the jurisdiction of this Honorable Court be maintained, and that the said indictments be dismissed and his bond cancelled.

Prays in the alternative that in the event this court should decree that it has jurisdiction, then and in that event, that this demurrer [fol. 9] and plea in abatement be sustained, and that the State of Louisiana be restrained and prohibited from further prosecuting said case pending the final determination thereof in the United States District Court, Western District of Louisiana, Lake Charles Division.

For all orders and decrees necessary in the premises, full, general and equitable relief.

(Signed) T. A. Edwards, Attorney for Defendant.

Jurat showing the foregoing was duly sworn to by Doras Herbert; omitted in printing.

[File endorsement omitted.]

[fol. 10] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

MOTION FOR A BILL OF PARTICULARS—Filed June 11, 1923

To the Honorable Judges of said Court:

Now into court comes the defendant, thru undersigned Counsel, and before arraignment and with the benefit of the exception and plea of abatement previously filed, specially reserved, respectfully shows:

1. That he is charged with manufacturing intoxicating liquors; and that in order for him to properly prepare his defense and to meet the indictment he is entitled to have the state set out particularly:

(a) The precise date or dates on which he manufactured intoxicating liquors.

(b) The kind of intoxicating liquors that he is alleged to have manufactured.

(c) The precise place said intoxicating liquors were manufactured, whether in his dwelling or on his property, with a complete description of the place where he is alleged to have manufactured such liquors, also, whether obtained by search warrant, if so, produce and file said warrant.

(d) That he is entitled to have the State produce and present in open court the articles of whatever nature with which he manufactured said liquors, and any apparatus alleged to have been used by your defendant in connection with the manufacture of said intoxicating liquors.

(e) Your defendant is further entitled to have the State produce in Open Court, the intoxicating liquor alleged to have been manufactured by defendant.

Wherefore your defendant prays that this motion for a Bill of Particulars be filed and maintained; and that the State be ordered to comply therewith within the time and in the manner ordered by the court, and upon its failure so to do, that said charge be dis-
[fol. 11] missed, defendant discharged and his bond cancelled.

For all orders and decrees necessary in the premises, full, general and equitable relief.

(Signed) T. A. Edwards, Attorney for Defendant.

[File endorsement omitted.]

IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

ANSWER TO BILL OF PARTICULARS—Filed June 12, 1923

Now comes the State of Louisiana, thru its duly authorized Asst. District Attorney, who for answer to the prayed for particulars, shows:

Answering inquiry (a) it shows that the date is properly set out in the indictment.

Answering Inquiry (b) it shows—whiskey.

Answering Inquiry (c) in old building about one acre from his, defendant's home, and under his control.

Respondent denies the right of defendant to require further answering, and accordingly prays to be discharged from further answering.

(Signed) John J. Robira, Asst. District Attorney.

[File endorsement omitted.]

[fol. 12] DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

MOTION FOR A NEW TRIAL—Filed June 27, 1923

To the Honorable Judges of said Court, the Honorable Thos. F. Porter, Jr., Presiding Judge:

Now comes defendant Doras Hebert, in the above entitled and numbered cause, and with respect, represents:

1. That he is aggrieved at the verdict of guilty rendered in the above entitled and numbered cause, and moves the court to grant him a new trial, and to set said verdict aside on the grounds and for the reasons following, to-wit:

(a) That the court erred in finding defendant guilty because the verdict is contrary to the law and the evidence, and particularly so since the defendant was not shown to have been present, or any where near the scene of the offense, and because there was positive proof by unimpeached witnesses against what the court termed circumstantial evidence and certainly cannot be held guilty on circumstantial evidence alone against positive proof without construing the reasonable doubt against the defendant.

(b) The court further erred in overruling the exception to jurisdiction and plea in bar to said prosecution, and objections to trial in this Honorable Court, because of the fact that the United States District Court had first assumed jurisdiction, and that your de-

fendant was indicted for the same charge growing out of the same statement of facts, and the same transaction, as set forth in the motion in said record, and made part hereof.

(c) Because the court further erred in disregarding the positive alibi proven by defendant as to his whereabouts at a point some fifteen miles distant from the place where the alleged still was found, defendant having left before daylight on morning of May 11, 1923, and did not return until 10:00 o'clock that night.

[fol. 13] (d) The court further erred in holding defendant guilty for the reason that the State in its Bill of Particulars, averred that the property on which said alleged still was found, was "under the control of defendant" whereas, the positive proof was that it was not even on his land, and that he had no control or supervision thereof, the owner thereof being an enemy of defendant, and with whom he was not on speaking terms; and because the charge being a misdemeanor, defendant could not be guilty of manufacturing liquor unless he *has* actually present, and there being no charge against any other person, said defendant not being charged as a principal and could not be charged as an accessory thereof, the State failed to establish that a crime had been com-itted within the intendment of the Statute.

(3) The Court further erred in its verdict for the reason that no proof was offered by the State to support its allegations in the indictment that intoxicating liquors were manufactured for beverage purposes, or to aver in the indictment that they were so unlawfully manufactured without a permit as provided under the Constitution of the United States, XVIII Amendment, and Sections 1 and 2 of Act 39 of 1921, and because Section 1 of said Act Number 39 of 1921 provides that "the manufacturing of intoxicating liquors is not an offense unless it is manufactured for beverage purposes, or for non beverage purposes, without a permit from the proper Federal Authorities" therefor, no crime was charged in said indictment, and when the State failed to prove that the property was under control of defendant, it did not prove its case, and to hold otherwise, would be a variance from the bill of particulars declared upon by the State. That there was no proof by the State to sustain the allegations that intoxicating liquors were manufactured for beverage purposes.

(f) The Court further erred in admitting testimony of the Federal Prohibition Agent, because the proof showed that the search warrant used by the said agent was for the dwelling of said defend-[fol. 14] ant, and the alleged still and mash found, was in a shack across a public road not on property owned by defendant, or connected with his dwelling, and over which he had no control or supervision, and because the proof showed that other persons had used the place from time to time, and no evidence in the record to show that defendant has used the premises; and because no liquor of any character was found on said premises; and none proven to

have been manufactured thereon, the only evidence being that mash was found in process of fermentation, and because no ingredients for purpose of manufacturing whiskey declared upon in the bill of particulars, was found upon the premises owned and occupied by defendant; and that oral evidence was not admissible after the Court declined to order search warrant produced.

(g) The Court further erred in permitting the State to show specific acts against the defendant on hearsay when his character was placed in evidence, all of the witnesses having testified that defendant's general reputation was good, and on answer to cross examination of the District Attorney, the witness Peloquin, a close neighbor of defendant, was asked if he had ever heard of defendant selling "shinney" to which the witness replied, over the objections of counsel for defendant, that he had heard so, but never knew of it and likewise the witness Hebert, who was one of the raiders of defendant's dwelling in his absence, because it was prejudicial to the defendant and no specific acts of defendant would be admissible, and it was considering hearsay evidence against the defendant in support of the indictment wherein he is charged with manufacture of intoxicating liquors, and court in trial without a jury being substituted for the jury, said hearsay evidence necessarily prejudiced the court against the accused, and the same was not admissible.

(h) The Court further erred in permitting evidence to be introduced as to the result of the raid by National Prohibition Agents on the dwelling house of defendant in his absence without the production of the search warrant, and the return thereon, and for the [fol. 15] reason that no still or other articles constituting the necessary thing for the manufacture of intoxicating liquors was found on the premises authorized to be searched by said alleged warrant, and said evidence having already been presented to the Federal Court where bills of information were filed against defendant by the United States District Attorney, and his case fixed for trial and where he is now under bond for his appearance to answer said indictment, because it subjected your defendant to two prosecutions for the same offense, and places him in jeopardy for the same offense in contravention and violation of his constitutional rights under the Federal and State Constitutions, and the same would not constitute legal evidence against the defendant because of his absence, and the failure of the state to produce any evidence whatsoever connecting your defendant with the alleged still and mash said to have been found in the abandoned shack not connected with his dwelling, or either under the control of defendant, or forming part of any property or premises owned by defendant, and no evidence to prove that he was even on said property.

(i) The Court further erred in holding defendant guilty under the date declared upon in the indictment, and under the Bill of Particulars declared upon, for the reason that the evidence was undisputed, not only on behalf of defendant but on behalf of the Dipping Inspector Mr. Hatfield and Mr. Midkiff, that defendant at

7:00 o'clock on the morning of May 11th, the date alleged in the Bill of Particulars was many miles away from the place where the alleged still was found, and remained more than fifteen miles away during the entire day and until 10:00 o'clock that night, that the raid on the abandoned shack was made in the absence of the defendant, and not one of the witnesses testifying for the State ever saw the defendant, either at his dwelling or about the abandoned house, or in that vicinity, consequently, the defendant cannot be convicted of committing an offense when his presence is necessary in order that he commit his said offense on the date charged in the indictment and set forth in the Bill of Particulars; and because it is [fol. 16] necessary in order to convict a person of even a crime of this character that he be present, and that the State prove some specific act to connect him with the offense; that said raid took place at 1:00 o'clock P. M. on said date.

Wherefore, defendant prays that his rights be specially reserved to him in being forced to trial in the State Court after previous indictment for the same offense in the United States District Court; that upon due hearing that he be granted a new trial, and that the verdict of the court herein be annulled and set aside, and that he be discharged with the cancellation of his said bond.

For all orders and decrees necessary in the premises, for full, general and equitable relief.

(Signed) T. A. Edwards, Attorney for Defendant.

Jurat showing the foregoing was duly sworn to by Doras Hebert; omitted in printing.

[File endorsement omitted.]

[fol. 17] In District Court of Jefferson Davis Parish

[Title omitted]

Motion in Arrest of Judgment—Filed June 29, 1923

To the Honorable the Judges of said Court:

Now into court comes defendant, thru undersigned counsel, and before sentence, files herein, a motion in arrest of judgment, and moves to arrest judgment and sentence herein on the grounds and for the reason following, to-wit:

1. Because this court is without jurisdiction in said cause for the reason that on the face of the record, your defendant has already been indicted in the United States District Court for the same offense under the XVIII Amendment to the Federal Constitution and the National Prohibition Laws, and said United States Court has assumed and been first seized of and still retains jurisdiction of this

cause; that said XVIII Amendment has destroyed State rights and the State thereunder has lost its identity as a separate sover-ignty, and your defendant is not amendable to two prosecutions for the same offense, which is in violation of the Articles of the Federal Constitution and the Articles of the Constitution of the State of Louisiana, and in each instance, said conviction deprives him of his liberty without due process of law in violation of both the State and the Federal Constitutions.

2. That said indictment charges no crimes under the Constitution and laws of the State of Louisiana.

Wherefore, defendant prays that said judgment be arrested and set aside; for all orders and decrees necessary in the premises; for full, general and equitable relief.

(Signed) T. A. Edwards, Attorney for Defendant.

[File endorsement omitted.]

[fol. 18] In District Court of Jefferson Davis Parish

[Title omitted]

Bill of Exception Number One and Order Settling Same—Filed June 26, 1923

Be it known and remembered, that in due course, counsel for defendant filed a special plea to the jurisdiction of this Honorable Court, plea in bar and objections to the trial, for the reason that defendant had previously been indicted in the Federal Court for the same offense growing out of the same transaction based upon dual prosecutions, etc., as fully set forth in said motion and agreed statement of facts, hereto annexed and made part hereof, which said pleas were overruled by the court, for the reasons following, to-wit:

* * * * * * *

(Signed) Thos. F. Porter, Jr., District Judge.

Whereupon, counsel for defendant then and there excepted to the ruling of the court and reserves a bill of exception, making said indictment, said motion and agreed statement of facts part thereof, and after having been presented to the District Attorney, now submits said bill of exceptions to the Hon. Thos. F. Porter, Jr., trial judge for approval and signature.

(Signed) T. A. Edwards, Attorney for Defendant.

Lake Charles, La., June 26, 1923.

[fol. 19] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

ANSWER TO BILL OF EXCEPTION # ONE

Reference to the case of the United States vs. Vito Lanca et al., decided on December 11, 1922, by Chief Justice Taft, disposes of this contention.

(Signed) John J. Robira, Asst. District Attorney.

[fol. 20] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

BILL OF EXCEPTION NUMBER TWO AND ORDER SETTLING SAME

Be it known and remembered, that on the trial of this cause counsel for defendant duly filed a motion for a bill of Particulars, which said motion is made part hereof and that said motion was overruled in part by the trial judge, for the reasons following, to-wit:

(Signed) Thos. F. Porter, Jr., District Judge.

Whereupon, counsel for defendant then and there excepted to the ruling and reserves a bill of exceptions in so far as it failed to order a full and complete Bill of Particulars as set out in said motion and made the said indictment and motion for Bill of Particulars, part of this bill, which after having been presented to the District Attorney, is now submitted to the court for approval and signature.

Lake Charles, La., June 26th, 1923.

(Signed) T. A. Edwards, Attorney for Defendant.

IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

ANSWER TO BILL NUMBER TWO

The Bill of Particulars as furnished, is sufficient information upon which to put the defendant on guard. The State is not required to disclose all of its evidence in a Bill of Particulars.

(Signed) John J. Robira, Asst. District Attorney.

[fol. 21] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

BILL OF EXCEPTION NUMBER THREE AND ORDER SETTLING SAME

Be it known and remembered that counsel for defendant before proceeding with the trial of said cause, and to the swearing of any witnesses, or taking of any evidence, as follows, to-wit:

1. Counsel for defendant objects to any proceeding in this cause, on the ground, and for the reason that the United States District Court for the Western District of Louisiana, has assumed and been seized of jurisdiction of this cause; that under the XVIII Amendment of the Federal Constitution, the two sovereignties were merged, and section two of said amendment, which merely authorizes concurrent powers between the Federal Government and the several states, and that after one is assumed, and been seized of jurisdiction, the state courts have no power to prosecute said cause.

2. Counsel further objects to any evidence relating to any manufacture of intoxicating liquors, for the above reasons, and for the further reason that under Act 39 of 1921, known as the Hood Law, no man's dwelling can be invaded without a search warrant on the affidavit of two reliable persons, particularly describing the dwelling, and premises to be searched.

3. Counsel objects to said amended bill of particulars, because it has changed the place where the liquors were alleged to have been manufactured, from the dwelling to an indefinite designation, and because the State has not produced the search warrant or the other data called for in the Bill of Particulars, and I make hereof, the statement admitted as to the indictment of the defendant and a motion of exception to jurisdiction and plea in bar, and a part hereof, together with any evidence taken on the subject matter.

[fol. 22] 4. I further except, as the data supplied is insufficient and particularly because the State has not declared whether or not it acted upon a search warrant or produced the same or any part of the articles claimed to have been seized thereunder.

5. I further object to trial, for the reason that the information does not set out that he manufactured intoxicating liquors without a permit:

which the trial court overruled for the reasons following, to-wit:

The assistant district attorney was allowed to amend his answer to the Bill of Particulars by stating a slightly different place as being the place where the intoxicating liquors were manufactured. Defendant's counsel did not state that the amendment took him by surprise, or that the point involved any part of his defense, or that he needed any time to prepare a defense on that point. No

request for time was asked, and no continuance was asked. No prejudice or inconvenience was suffered by the defendant.

The evidence in the case shows that defendant was bound to be aware of the contention that state would make, as to the place the liquor was manufactured, and that he was aware of this contention long before the trial.

(Signed) Thos. F. Porter, Jr., District Judge.

Whereupon counsel for defendant then and there excepted to the ruling of the court and reserves a bill of exception, making said objection, the indictment and evidence in the case part thereof, to which bill, after having been presented to the District Attorney, is not submitted to the trial court for approval and signature.

Lake Charles, La., June 26, 1923.

(Signed) T. A. Edwards, Attorney for Defendant.

[fol. 23] In District Court of Jefferson Davis Parish

[Title omitted]

Answer to Bill Number Three

Paragraph 1. For the same reason as urged in Bill of Exception Number One, this objection is without merit.

Paragraph 2. Search warrants are not essential in convictions for these offenses, it is only one of the methods given to obtain evidence.

Paragraph 3. For the same reasons as urged in paragraph two, this exception is without merit.

Paragraph 4. The State is not required to disclose all of its evidence. The defendant was sufficiently put on guard with the evidence furnished.

Paragraph 5. The allegation "unlawful" is synonymous with "without permit."

(Signed) John J. Robira, Asst. District Attorney

[fol. 24] In District Court of Jefferson Davis Parish

[Title omitted]

Bill of Exception Number Four (See Testimony, Page 33) and Order Settling Same

Be it known and remembered that on the trial of this case, the defendant having placed his character in evidence, and witnesses having testified that his general reputation in the community was

good on cross examination the court overruled the objection of defendant, permitted the District Attorney to ask the witness Peloquin and Hebert if they had heard of the defendant selling "Shinny," to which counsel for the defendant then and there objected on the ground that it was a specific act and not in accordance with the rule, which objection the court overruled for the reasons following, to-wit:

The witness Peloquin, was offered by the defendant as a character witness, and testified that defendant's character as a law abiding citizen was good. In order to impeach the testimony of this character witness, the state was allowed to ask the witness if he (the witness) had not heard of the defendant's selling "shinny." This evidence was not admitted for the purpose of showing that defendant was guilty in this case, but the question was permitted solely for the purpose of affecting the credibility of the character witness, Peloquin, and the answer to the question was not considered by the court, as affecting the guilt or innocence of the accused, but it was considered solely as to its effect on the question of whether or not he was a man of good reputation as a law abiding citizen.

(Signed) Thos. F. Porter, Jr., District Judge.

Whereupon counsel for defendant then and there excepted and reserves a bill of exception, making said question and answer part thereof, which after having been presented to the District Attorney, now submits the same to the trial court for approval and signature.

(Signed) T. A. Edwards, Attorney for Defendant.

Lake Charles, La., June 26th, 1923.

[fol. 25] In District Court of Jefferson Davis Parish

[Title omitted]

Answer to Bill Number Four

This exception is without merit. The witness, Peloquin, was placed on the stand by defendant to prove good character. He testified that the defendant bore a good reputation. On cross examination he was asked the question by the Assistant District Attorney: "Is it not generally understood in the neighborhood that defendant sells whiskey? To which he answered— "I did not buy any myself, but I have heard that he does." Such evidence is certainly proper, as the fact of it being reported in the community that he sold liquor was proper to disprove his original testimony that he bore a good reputation as a law abiding citizen.

(Signed) John J. Robira, Asst. District Attorney

[fol. 26] In District Court of Jefferson Davis Parish

[Title omitted]

Bill of Exception Number Five and Order Settling Same

Be it known and remembered that on the trial of this case, counsel for defendant objected to testimony of the National Prohibition Agent, Landry, wherein he testified with reference to a half quart of intoxicating liquor being found in the dwelling of defendant in his absence, and which objection the court sustained, but permitted the witness to testify as to finding the intoxicating liquor in the dwelling of defendant, to which defendant objected on the ground that it was at variance with the bill of particulars declared upon, and not binding on the accused in his absence. Therefore, inadmissible, irrelevant and immaterial, which objection, the court overruled for the reasons following, to-wit: (See per Curiam attached to this bill.)

(Signed) Thos. F. Porter, Jr., District Judge.

Whereupon counsel for defendant then and there excepted to the ruling of the court, and reserves this bill of exception, which after having been presented to the District Attorney, is now submitted to the Court for approval and signature.

(Signed) T. A. Edwards, Attorney for Defendant.

Lake Charles, La., June 26th, 1923.

[fol. 27] In District Court of Jefferson Davis Parish

[Title omitted]

Answer to Bill Number Five

The evidence is admissible for the reason that the finding of liquor in the home of defendant is one of the circumstances necessary to prove possession. The presence or absence of defendant from the premises makes no difference, as his control is just the same in his absence or in his presence. When liquor is found on his premises, he must prove to the court that he had no connection with the liquor.

(Signed) John J. Robira, Asst. Dist. Attorney.

IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

PER CURIAM TO BILL NO. 5

In this case, it appeared from the evidence that the search and seizure made under the Federal Warrant were made while the defendant was temporarily absent from his home.

It appeared from the evidence that when the Federal Officers were making the search of a building near defendant's home, the defendant's wife took a considerable quantity (much more than one-half quart) of moonshine whiskey out of the defendant's dwelling house, and attempted to hide it in an out building. This testimony was objected to by counsel for defendant. This evidence was admitted for what it was worth as tending to show that defendant manufactured moonshine whiskey from the still, and from the mash which the court found to be in his possession, and to have been operated by him. No objection to testimony was maintained on this point, as the court considered it clearly admissible. It will be borne in mind that evidence of the facts that defendant's wife took moonshine whiskey from the defendant's dwelling house, and attempted to hide it, were admitted solely for what they were worth, to show whether or not moonshine whiskey had been manufactured by the said still, and the fact that defendant's wife was trying to hide the liquor, was in no wise considered by the court, as being relevant to the issue in this case.

(Signed) Thos. F. Porter, Jr., District Judge.

[fol. 28] IN DISTRICT COURT OF JEFFERSON DAVIS PARISH

[Title omitted]

BILL OF EXCEPTION NUMBER SIX (SEE TESTIMONY, PAGE 33) AND ORDER SETTLING SAME

Be it known and remembered, that on the trial of this case, counsel for defendant moved the court to charge itself as follows:

1. That all of the witnesses in the case testified that the defendant, Doras Hebert, was not present.

2. That all of the evidence shows that under the declaration of the bill of particulars, that the premises on which the alleged manufacturing was done, were not the property of defendant, nor under his control and possession.

3. That no evidence was adduced to show that any liquor was manufactured at all, and that the only testimony in the record was mash in process of fermentation.

4. No evidence was proven or offered in evidence to show that any liquor was manufactured for beverage purposes, without a permit, as stipulated by the acts of Louisiana.

Which motion was overruled by the court for the reasons following, to-wit: (See attached Per Curiam.)

Whereupon, counsel for defendant then and there excepted to the ruling of the court and reserves a bill of exception, and makes the said special charges part of said bill, which after having been presented to the District Attorney, now submits the same to the Honorable Thos. F. Porter, Jr., trial judge for approval, and signature.

Lake Charles, La., June 26th, 1923.

(Signed) T. A. Edwards, Attorney for Defendant.

[fol. 29] In District Court of Jefferson Davis Parish

[Title omitted]

Answer to Bill Number Six

The Court properly charged itself that the absence of the defendant from the premises at the time the liquor was found was a circumstance that would be taken into consideration in determining the guilt or innocence of the accused.

Paragraph 2. The Court properly charged itself that it would be necessary to find that the property at the time that the liquor was being manufactured was under the control and possession of the accused.

Paragraph 3. The Court charged itself that unless evidence would establish the fact beyond a reasonable doubt that liquor was being manufactured it would acquit and that it considered the finding of mash in the quantities and in the process of fermentation as now testified to would be evidence of guilt.

Paragraph 4. The Court further charged itself that the word "unlawfully" as used in the indictment, was synonomous with the phrase "without a permit" and there being no error in any of these rulings, the bill of exception is without merit.

(Signed) John J. Robira, Assistant District Attorney.

[fol. 30] In District Court of Jefferson Davis Parish

Per Curiam to Bill Number Six

The court did not give the charge that the Assistant District Attorney in his statement in this bill says was given:

The Assistant District Attorney's statement does not clearly state the law, and the court did not give any such charge, and did not consider the absence of the defendant from the premises at the time the liquor was found, as showing or tending to show that the defend-

ant was guilty of the crime charged. The court refused to give the charges requested by counsel for defendant in this bill, for the reason that they do not involve questions of law, and that in so far as they are statements of facts, they are incorrect. The court specially found that the defendant in fact, owned the still, and manufactured the liquor in the house where the still and mash were found. The court specially found that intoxicating liquor was manufactured, and it is not true that the only evidence to show manufacturing was that there was mash in the process of fermentation.

All the evidence taken together, showed beyond a reasonable doubt that the moonshine liquor manufactured by the defendant was for beverage purposes.

(Signed) Thos. F. Porter, Jr., District Judge.

[fol. 31] In District Court of Jefferson Davis Parish

[Title omitted]

Bill of Exception Number "A" and Order Settling Same

Be it known and remembered that in the above entitled and numbered cause, counsel for defendant filed herein, a motion for a new trial on the various grounds set out in said motion, which is made part of this bill of exceptions, and which motion for a new trial was overruled by the court on the ground and for the reasons following, to-wit:

* * * * * * *

(Signed) Thos. F. Porter, Jr., District Judge.

Thereupon counsel for defendant then and there excepted to the ruling of the court, making said motion for a new trial the court minutes, the indictment and the record in said cause part thereof, which after having been presented to the District Attorney, is now submitted to the trial court for signature and approval.

Lake Charles, La., July 2nd, 1923.

(Signed) T. A. Edwards, Attorney for Defendant.

[fol. 32] In District Court of Jefferson Davis Parish

[Title omitted]

Bill of Exception Number "B" and Order Settling Same

Be it known and remembered that counsel for defendant filed in the above entitled and numbered cause, a motion in arrest of judgment, based on various grounds set forth in said motion, which was

overruled by the court on the grounds and for the reasons following, to-wit:

* * * * * * *

(Signed) Thos. F. Porter, Jr., District Judge.

Thereupon, counsel for defendant then and there excepted to the ruling of the court, making the record and said motion part thereof, which after having been presented to the District Attorney, is submitted to the trial court for signature and approval.

Lake Charles, La., July 2nd, 1923.

(Signed) T. A. Edwards, Attorney for Defendant.

[fol. 33] In District Court of Jefferson Davis Parish

[Title omitted]

Colloquy Between Court and Counsel

By Mr. Edwards: Counsel for defendant makes substantially the same objections raised in the proceeding case of State vs. Alcee Benoit.

By the Court: The rulings of the court are the same as in the prior case.

Mr. Edwards: (See Bill #4, page 24.) I object to any specific acts on the ground, and for the reason that the witness having testified he never heard his reputation questioned, and on cross examination, the District Attorney asked the witness if he had heard of the defendant selling shinney, and the witness answered he had heard it, but did not know, to which counsel for the defendant objects on the ground that it is a specific act, and only the general reputation of the defendant is the rule.

By the Court: The Objection is overruled.

Mr. Edwards: I except to the ruling of the court. Counsel for defendant moves the court to charge itself (See Bill #6, page 28):

1. That all of the witnesses in the case testified that the defendant Doras Hebert was not present.

2. That all of the evidence shows that under the declaration of the bill of particulars, that the premises on which the alleged manufacturing was done, were not the property of defendant, nor under his control and possession.

3. That no evidence was adduced to show that any liquor was manufactured at all, and that the only testimony in the record with reference to any liquors under the bill of particulars, was mash in process of fermentation.

4. No evidence was proven or offered in evidence to show that any liquor was manufactured for beverage purposes, without a permit, as stipulated by the acts of Louisiana.

[fol. 34] The court allows counsel for defendant a bill of exception on the question of whether liquor found in the residence of defendant, and to which counsel for defendant excepted and reserved a bill of exceptions, on the ground that it went beyond the bill of particulars furnished, and was irrelevant and immaterial, and in the absence of the defendant, and that he was not shown to have had any physical possession of any liquor, still or mash.

I hereby certify that the above and foregoing is a true and correct transcript of all stenographic notes taken by me in the above numbered and entitled cause, on June 16, 1923.

(Signed) Lou Edward Cox, Stenographer.

[fol. 35] In District Court of Jefferson Davis Parish

Clerk's Certificate

I, L. Z. Toups, Deputy Clerk of the Fifteenth Judicial District Court, in and for said Parish and State, do hereby certify that the within and foregoing contains a full, true and correct copy of all pleadings, with documents attached, minutes of court showing action in the case, exhibits, orders of court, documents introduced in evidence, Bill of Exceptions and order of Appeal and Oral Testimony in order taken, all had in the matter of State of Louisiana vs. Doras Hebert, No. 1329 on the Criminal Docket of the Fifteenth Judicial District Court in and for Jefferson Davis Parish, Louisiana.

In testimony whereof, witness my official signature and seal of office, at Jennings, Louisiana, July 16th, A. D. 1923.

(Signed) L. Z. Toups, Chief Deputy Clerk of said Court.

[fol. 36] In Supreme Court of Louisiana

State of Louisiana

vs.

Doras Hebert

Order Continuing Cause

(Extract from the Minutes)

New Orleans, Friday, October 19th, 1923.

The Court (Division "C") was duly opened, pursuant to adjournment. Present: Their Honors Winston Overton, John St. Paul, and David N. Thompson, Associate Justices.

No. 26165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26166

STATE OF LOUISIANA

vs.

ALCEE BENOIT et als.

These two causes were called and ordered by the Court to be continued until Friday the 26th day of October, 1923, upon the motion of Mr. T. S. Walmsley, counsel for the State.

IN SUPREME COURT OF LOUISIANA

ARGUMENT AND SUBMISSION—October 26th, 1923

The Court (Division "A") duly opened, pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Wynne G. Rogers and Harney F. Brunot, Associate Justices.

No. 26165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26166

STATE OF LOUISIANA

vs.

ALCEE BENOIT et als.

These two causes were called and argued by counsel. Mr. T. [fol. 37] Arthur Edwards opened the argument for the defendants and appellants. Mr. T. Semmes Walmsley replied for the State, appellee, and Mr. Edwards closed the argument. The Court then took the causes under advisement.

IN SUPREME COURT OF LOUISIANA

FINAL JUDGMENT—November 12th, 1923

The Court (sitting En Banc) was duly opened, pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harney F. Brunot, Paul Leche and David N. Thompson, Associate Justices.

[Title omitted]

The verdict appealed from is affirmed; the sentence to pay a fine of $500 and costs, and to be imprisoned 60 days, is affirmed; the additional sentence of imprisonment for 6 months in default of payment of the fine is annulled.

[fol. 38] IN SUPREME COURT OF LOUISIANA

[Title omitted]

Thomas P. Porter, Judge

OPINION

O'NIELL, J.:

Appellant was convicted of manufacturing intoxicating liquor for beverage purposes, and was sentenced to pay a fine and be imprisoned. The record contains eight bills of exception, presenting seven complaints.

The first complaint is that the district judge overruled appellant's plea to the jurisdiction of the court, based upon the fact that he had been indicted by the Federal grand jury for a violation of the Volstead Act by the same alleged transaction for which he was indicted and was about to be put on trial for violation of the Hood Law—Act 39 of 1921, p. 42. The plea was founded upon the idea that the prosecution in the Federal court for an alleged violation of the Volstead Act and in the State court for an alleged violation of the Hood Law, for one and the same alleged manufacturing of intoxicating liquor, violated the constitutional guaranty against a double prosecution for one offense.

The point was decided the other way, by the Supreme Court of the United States, in United States v. Vito Lanza et al., 5 Adv. Op. Oct. Term 1922, p. 169.

The second complaint is that the judge refused to compel the district attorney to produce in court the intoxicating liquor which appellant was accused of having manufactured, and the apparatus which he was accused of having used.

It is not essential to a valid conviction for the offense of manufacturing intoxicating liquor for beverage purposes that either the

liquor itself or the apparatus with which it was made should be offered in evidence or produced in court.

The third complaint is that the judge overruled appellant's objection to the State's putting him on trial, or offering any evidence [fol. 39] in the case, without first producing the search warrant on which his residence was searched.

The evidence on which the prosecution was based was obtained by Federal officers, who searched plaintiff's premises under authority of a warrant from the Federal court. There is no merit in the argument that the evidence obtained in that way was not admissible in the prosecution in the State court.

The fourth complaint is that the district attorney was allowed to amend the bill of particulars which he had furnished in response to a motion by appellant's counsel, by changing the designation of the place where the intoxicating liquor was alleged to have been manufactured.

There are three reasons why the complaint is not serious. The change of location of the alleged manufacturing outfit was very slight in point of distance; the amendment of the bill was made before the trial had commenced; and the attorney for defendant, both being in court, did not ask for a continuance of the case, or announce that the amendment of the bill affected his defense in any way.

The fifth complaint is that the judge overruled defendant's objection to going to trial without an allegation, either in the indictment or in the bill of particulars, that the alleged manufacturing of liquor was done without a permit.

The charge that the defendant had manufactured the intoxicating liquor—whisky—unlawfully and for beverage purposes was sufficient to accuse him of one of the offenses denounced in the first paragraph of the first section of the statute. It is only when the accusation of manufacturing, selling, or otherwise disposing of, transporting, delivering, possessing, importing or exporting, of intoxicating liquor, is alleged to have been "for non-beverage purposes," according to the second paragraph of the first section of the statute, that it is necessary to allege that the party accused was not "the holder of a legal permit therefor from proper Federal authorities." The statute does not provide—or leave the inference—that a person might hold a permit to manufacture intoxicating liquor for beverage purposes.

The sixth complaint is that the judge overruled an objection [fol. 40] made by defendant's counsel to a question asked by the district attorney in cross-examining a defense witness, who had testified to the defendant's general reputation for good character. There were two such objections and rulings, with regard to different witnesses. The question was, in each instance, whether the witness had ever heard of the defendant's selling "shinny" in the neighborhood; and the answer, in each instance, was that the witness had heard of defendant's selling "shinny," but had not bought any of it. Shinny, as we are informed, is a very intoxicating moonshine whisky; for which reason, the answer elicited by the district attorney's ques-

tion was quite pertinent—coming from a character witness—in a prosecution for an alleged violation of the prohibition law.

The seventh complaint is that the judge refused to give or announce and be governed by the several so-called special charges requested by defendant's counsel. The requested charges, so-called, were not propositions of law at all. They were statements or conclusions of what facts had or had not been proven. For that reason the judge's ruling was correct.

Our conclusion is that the verdict is correct. But the alternative sentence of imprisonment for six months, over and above the sentence of sixty days imprisonment, first imposed, as in excess of the maximum penalty imposed by the statute, and is therefore invalid.

The language declaring what shall be the penalty—in the third section of the statute—is not as plain as it might be, except in so far as it makes the maximum penalty that can be imposed for the first offense, of manufacturing intoxicating liquors, a fine of $500 and imprisonment for 60 days, viz:

"Section 3. That any person who shall violate the provisions of this act by manufacturing, or having in possession, for sale, or, by selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars ($500.), and be imprisoned not less than ten days nor more than sixty days, and for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000.00), and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this Act shall, upon conviction, be fined as herein above provided, or, may be imprisoned not exceeding the maximum limits herein above provided, or, may be both fined and imprisoned, at the discretion of the court."

[fol. 41] It seems plain, therefore, that the penalty for manufacturing intoxicating liquor for sale, or for having it for sale, or for actually selling it, is both fine and imprisonment; whereas, the penalty for manufacturing intoxicating liquor for beverage purposes but not for sale, or the penalty for possessing it for beverage purposes but not for sale, may be either fine or imprisonment, or both, at the discretion of the court.

This is the defendant's first offense, as far as the accusation and the proof go. The offense was manufacturing the whisky for beverage purposes, but not for sale. Therefore, the maximum penalty for the offense was a fine not exceeding $500, or imprisonment for a term not less than 10 nor more than 60 days, or both the fine and imprisonment, within those limits, at the discretion of the court.

The reason why the legislature left it to the discretion of the courts to impose as light a fine as the judge might deem just, either with or without a jail sentence, when the manufacturing or possessing of the liquor was not for sale, is obvious. In the first paragraph of Section 4 of the statute, it is declared lawful for any one to possess intoxicating liquors, legally acquired, in his residence or place of

abode, for his own consumption and that of his family, and for the entertainment of his guests. And, in the second paragraph of the same section, it is declared lawful for any householder to brew beer or to ferment wine for the family use and for the entertainment of guests. Whether it was wise or unwise for the legislature to make those exceptions in the law is a matter which the courts are not officially concerned with. We mention the immunity given to the home brewers and fermenters, and to the possessors of private stock for the entertainment of guests, as showing that the legislature did not intend to be as severe in the punishment of the maker or possessor of intoxicating beverages not for sale, as in the punishment of the lawbreaker who allows financial profit to reconcile his mind to infamy. Even as to him, the legislature has limited the fine to $500 and the term of imprisonment to six months, for the first offense. [fol. 42] That discussion, however, is somewhat beside the question in this case, because the appellant was convicted of manufacturing the whisky only for beverage purposes, not for sale. For that offense, the judge had the authority and discretion to impose the fine not exceeding $500 or the imprisonment for a term not less than 10 nor more than 60 days, or to impose both the fine and imprisonment, within the limits—or to the limit—but not beyond.

No explanation has been given for the alternative sentence of imprisonment beyond the maximum term fixed by the statute. It is said in the brief of the learned counsel for appellant that he assumes that the judge relied upon the Act 51 of 1906, p. 85. But that cannot be so, because the statute does not purport to deal with the length of prison terms, but merely declares that every sentence of imprisonment in a parish jail, or without specification as to the place of imprisonment, "shall mean imprisonment with hard labor," etc., viz.:

"That, in all prosecutions, where any person is sentenced to imprisonment, or to imprisonment in default of the payment of the fine imposed, whether in the parish jail, or without qualification as to the nature of such imprisonment; or where any person is sentenced to imprisonment in default of the payment of the fine imposed for the violation of any valid ordinance of any of the political subdivisions of the State, such imprisonment shall mean imprisonment with hard labor; and every person so sentenced, if not put to work under the provisions of Act No. 29 of 1894, as amended by Act No. 46 of 1902, shall be required to work on the public roads, streets, or levees of the parish or municipality responsible for the costs of the prosecution of such person, or within the walls of the jail, under such rules and regulations as shall be prescribed by the police jury or city council of such parish or municipality."

We assume that the judge, in this case, interpreted Section 980 of the Revised Statutes as allowing him to impose an alternative sentence of imprisonment not exceeding one year, over and above the maximum punishment allowed by the statute which was violated. Our opinion is that Section 980 of the Revised Statutes, putting a maxi-

mum limit of one year on the term of imprisonment that may be imposed as an alternative sentence, or in default of the payment of a fine, is applicable only when the statute imposing the fine does not itself say what shall be the maximum sentence of imprisonment that may be imposed in default of payment of the fine. Section 980 provides:

[fol. 43] "Every person being adjudged to pay a fine shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year."

Surely that general provision in the law cannot prevail over a particular provision in a subsequent statute, declaring that, for the violation of that particular statute, the penalty of imprisonment shall not exceed 60 days—and shall be not less than 10 days—whether it be imposed in addition to or as an alternative, or in default, of a fine not exceeding $500. It is not possible that Section 980 of the Revised Statutes prevents the legislature from enacting a law declaring that the maximum term of imprisonment, as an alternative penalty, in default of payment of a fine, for the violation of that law shall be less than one year.

There is nothing inconsistent in the legislature's saying—as it does say in Section 980 of the Revised Statutes—that, whenever a person is sentenced to pay a fine, he shall, in default of payment of the fine, be imprisoned for a term not exceeding one year, and then saying, in the Act 39 of 1921, that, for a violation of this act, the penalty of imprisonment shall not exceed 60 days, whether it be imposed as an alternative sentence, in default of the fine, or be imposed in addition to the fine—which shall not exceed $500.

If—this being the defendant's first offense—the judge had given him an alternative sentence, as the judge had the right to do, by sentencing him to pay a fine fixed by the judge (not over $500), or to be imprisoned in default thereof, the judge could not have made the term of imprisonment longer than 60 days. That is certain, because the statute, in very plain language, says that the penalty of imprisonment shall not exceed 60 days, whether it be imposed as an alternative, in default of payment of a fine, or in addition to a fine—not exceeding $500. If the judge intended that the defendant should serve a term in prison—fine or no fine—and that he should also be given an inducement to pay a fine, the judge might have fined him and sent him to jail for a term less than 60 days, and, at the same time, sentenced him to imprisonment for the remainder of the 60 days, or for any part thereof, in default of his paying the fine.

The sentence in this case is, not a fine of $500 or imprisonment for [fol. 44] 60 days, or even a fine of $500 and imprisonment for 60 days. The sentence is that the defendant shall be imprisoned for 8 months in default of his paying a fine of $500, and that he shall be imprisoned only 60 days in the event of his paying the fine of $500.

To say that the alternative sentence of six months' imprisonment is not imposed as a penalty for the violation of the law, but is applied only as an inducement for the defendant to pay the fine, would be

only saying words—like the dark-y's charging the hunter 25 cts. for skinning a coon and $5 for knowing how.

There are three adjudged cases analogous to the case before us. State ex rel. Taquino v. Arnauld, Recorder, 49 La. Ann. 104; State v. Voss, 40 La. Ann. 444; and State ex rel. Daubert v. Recorder, 52 La. Ann. 1079.

Act 41 of 1890, p. 33, authorized the City of New Orleans, through its recorders, to enforce obedience to the city's ordinances

"by fine or imprisonment, or both, or by imprisonment in default of the payment of the fine; provided that the fine shall not exceed twenty-five dollars for each offense, nor the imprisonment (be) more than thirty days," etc.

In State ex rel. Taquino v. Arnauld, Recorder, supra, the relator was convicted of a violation of Ordinance No. 12,755, the penalty for which was

"a fine not to exceed twenty-five ($25) dollars, or imprisonment in the parish prison for a term not to exceed thirty (30) days, or both, or imprisonment in said parish prison for a term not to exceed thirty (30) days in default of the payment of said fine; provided that the fine shall not exceed twenty-five ($25) dollars for each offense, nor the imprisonment (be) more than thirty (30) days."

Under the peculiar language of the ordinances, and in view of Section 980 of the Revised Statutes, the recorder gave a sentence somewhat like the sentence imposed in the case before us. We quote from the decision, viz:

"The sentence imposed upon relator was to pay a fine of twenty-five dollars, and to be imprisoned for thirty days in the parish prison, and, in default of the payment of the fine, to be imprisoned an ad-|fol. 45| ditional thirty days."

The court annulled the sentence, saying:

"The additional imprisonment for non-payment of the fine, added to that imposed for violation of the ordinance, can not exceed thirty days."

In State v. Voss, supra, the defendant was convicted of violating an ordinance forbidding lotteries, and imposing a penalty similar to that imposed by the ordinance violated in the Taquino case. Voss was sentenced to pay a fine of $25 and be imprisoned for ten days, and, in default of payment of the fine, to be imprisoned for an additional term of 20 days—the remainder of the maximum term allowed by the statute. This court affirmed the sentence, saying that the *the* statute was "saved by the proviso limiting the fine to twenty-five dollars and all imprisonment to thirty days."

The same question came up in State ex rel. Daubert v. Recorder, 52 La. Ann. 1079, where the relator was sentenced to pay a fine of $25 and to serve five days in prison, and, in default of payment of the fine, to serve an additional twenty-five days in prison. This court affirmed the sentence, on the ground that both the absolute

sentence of imprisonment and the alternative sentence, added together, did not exceed the maximum term fixed in the ordinance or by the statute authorizing the maximum sentence of thirty days imprisonment.

The ruling made in Mayor and Selectman of the Town of Homer v. Blackburn, 27 La. Ann. is also very much in point.

There is an earlier case, State v. Jumel 13, La. Ann. 399, where the court used language which we cannot reconcile with the subsequent rulings or with our own opinion, and which must therefore be considered overruled. The same may be said of the ruling in State ex rel. Courrege v. Mayor, 50 La. Ann. 45, so far as it is pertinent.

In State v. Authement, 139 La. 1070, 72 South. 739, the defendant was convicted of an offense for which the penalty was a fine not less than $100 nor more than $5,000, or imprisonment in jail for a term not less than 90 days nor more than 2 years, or both the fine and imprisonment, at the discretion of the court. Sec. 24 of Act 189 of 1910, p. 302. He was sentenced to pay a fine of $301 [fol. 46] or be imprisoned for the minimum term of 90 days. The question was whether this court had jurisdiction—whether the fine exceeding $300 was actually imposed. We concluded that the fine was actually imposed, notwithstanding it was only an alternative sentence. But the writer of the opinion in the case assumed that the alternative penalty of imprisonment for 90 days—even though it was the minimum term fixed by the statute which was violated—was not imposed under authority of the statute which was violated—but was imposed under authority of Section 980 of the Revised Statutes. The section of the Revised Statutes, however, could not possibly have controlled the judge in fixing the sentence, because the statute which was violated fixed the maximum term of imprisonment twice as long as the maximum term fixed by the Revised Statutes. The following expression in the opinion, therefore, was founded upon the presumption—which we are constrained to say was not substantial—that the alternative sentence of 90 days imprisonment was imposed not under authority of the statute that was violated, but under authority of Section 980 of the Revised Statutes, viz:

"The pronouncement of this alternative sentence at that time, or, as one might say, thus anticipatorily, is done as a mere matter of convenience; in reality the case is ripe for this alternative sentence only after the accused has failed to pay the fine, and the recovery of it out of his property has been found to be impracticable."

The dissertation which we have quoted was not essential to the ruling and is therefore not authoritative.

The verdict appealed from is affirmed; the sentence to pay a fine of $500 and costs, and to be imprisoned 60 days, is affirmed; the additional sentence of imprisonment for 6 months in default of payment of the fine is annulled.

Land, J., dissents and hands down reasons.

[fol. 47] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR REHEARING—Filed November 23, 1923

To the Honorable the Supreme Court of the State of Louisiana:

The State of Louisiana, appellee in the above numbered and entitled cause, presents this its application for a rehearing in the above numbered and entitled cause, and complains and feels aggrieved at the judgment rendered herein by this Honorable Court on Monday, November 12, 1923, for the following reasons, to-wit:

The State of Louisiana feels aggrieved at the setting aside of the additional time of six months to be served by the accused in the event the accused fail to pay the fine provided for in the sentence.

Section 3 of the Hood Act, which is No. 39 of the Acts of the Extra Session of 1921, reads as follows:

"That any person who shall violate the provisions of this Act by manufacturing, or having in possession, for sale, or by selling intoxicating liquor, shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars ($500.00), and be imprisoned not less than ten days nor more than sixty days, and for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000.00), and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this Act shall, upon conviction, be fined as herein above provided, or, may be imprisoned not exceeding the maximum limits herein above provided, or, may be both fined and imprisoned, at the discretion of the court."

This Honorable Court will notice that there is no provision in the statute which provides for the contingency that the accused should default in the payment of his fine, this omission evidently being purposely made by the Ledislature, bearing in mind Section 980 of the Revised Statutes, which reads as follows:

"Every person being adjudged to pay a fine shall, in default of payment or recovery thereof, be sentenced for a period not exceeding one year."

If the Act had stated that in default of payment of fine, the accused could not be sentenced to more than sixty days additional, or if it [fol. 48] contained a clause providing for a penalty in default of payment of the fine, the opinion as rendered by this Honorable Court would be correct. But if the opinion of this Honorable Court would be permitted to stand, it would be putting a premium on those persons who would refuse to pay the fines imposed by the lower court, and certainly this never was the intention of the Legislature. In other words, where two persons are convicted for the same offense

and both receive the maximum sentence under the law, and where one paid his fine of $500.00 and the other refused to pay the fine, upon getting out of jail at the end of sixty days they would not be in the same position, for the reason that one would be $500.00 richer for having refused to comply with the judgment of the court.

This opinion of the Court, if permitted to stand, would not only seriously interfere with the administration of justice, but would encourage the lawless element of the State to refuse paying fines and would affect many other acts of the Legislature besides the Hood Act, because very few of the criminal statutes provide for an additional penalty in the event of failure to pay the fine imposed.

Wherefore, your applicant prays that a rehearing be granted in the above numbered and entitled cause, and, after being granted, that the case be assigned for argument, and that, finally, the judgment of the lower court be reinstated and affirmed.

(Signed) A. V. Coco, T. S. Walmsley, A. J. Borelon.

[File endorsement omitted.]

[fol. 49] IN SUPREME COURT OF LOUISIANA

[Title omitted]

DISSENTING OPINION OF MR. JUSTICE LAND

LAND, J. (dissenting):

The defendant is charged with unlawfully manufacturing intoxicating liquors for beverage purposes. He was convicted and sentenced to pay a fine of $500 and to imprisonment in jail for sixty days, and, in default of the payment of fine, it was ordered that defendant be imprisoned for an additional period of 6 months.

That part of the sentence of the lower court inflicting the additional imprisonment was set aside in this case, upon the ground that it exceeded the maximum punishment of 60 days fixed by section 3 of the Hood Act, Act 39 of 1921, Extra Session.

In my opinion, this ruling is clearly erroneous, for the reason that said section of said act does not pretend to fix any punishment at all in default of payment of the fine which may be imposed under said section. The maximum imprisonment fixed by said act at 60 days is not an alternative imprisonment to be imposed in default of payment of the fine, but is a primary imprisonment to be imposed in addition to the fine, for the violation of the act. This is made clear by the language of section 3 of said act, which is as follows: "That any person who shall violate the provisions of this act by manufacturing * * * for sale * * * intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars ($500), and be imprisoned not less than ten days nor more than sixty days * * * and any person who shall otherwise violate the pro-

visions of this act shall, upon conviction, be fined as hereinabove provided (not more than $500), or may be imprisoned not exceeding the maximum limits herein above provided (not more than sixty days), or, may be both fined and imprisoned, at the discretion of the court."

[fol. 50] The phrase, "otherwise violate the provisions of this act," as relates to the offense of manufacturing, refers to manufacturing intoxicating liquors "for beverage purposes."

While Section 3 of this act makes the manufacturing "for sale" of intoxicating liquors punishable necessarily by both fine and imprisonment, it permits the trial judge to fine or imprison, or to fine and imprison at his discretion, in all cases where the manufacturing of intoxicating liquors is "for beverage purposes."

It is evident, therefore, that when the trial judge sees fit so to do, he may fine and imprison for manufacturing intoxicating liquors "for beverage purposes", as well as in cases of manufacturing "for sale", the limit of fine and imprisonment being the same in both cases under section 3 of said act.

The maximum limit of imprisonment of 60 days was fixed in said act for the first offense, not for the purpose of limiting additional imprisonment, under Section 980 of the Revised Statutes, in default of payment of fine, but merely to limit the imprisonment which might be imposed under the Hood Act for its violation in the first instance.

In obedience to the requirements of former constitutions the legislature has graded misdemeanors and minor offenses in many cases, fixing the minimum and maximum limits of fine and imprisonment in the respective acts; but that the object of such grading was not to repeal or affect Section 980 of the Revised Statutes is made evident by the fact that this section remains today intact in the Revised Statutes of this state, its sole object being to supply an alternative sentence when omitted from any criminal statute.

Section 980 of the Revised Statutes of 1870 provides that: "Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year."

The very purpose of this section of the Revised Statutes is to provide for the enforcement of the payment of fines, in all cases where [fol. 51] an act fails to provide for a period of imprisonment, in default of the payment of a fine imposed under the act. If a criminal statute fails to fix its own alternative punishment, it is clear, therefore, that such omission is not to be interpreted as excluding such additional punishment, merely because a maximum limit for imprisonment is established in such statute. To exclude such alternative punishment, a statute must either prescribe such punishment itself, or plainly disclose that none shall be inflicted, as the general law in the Revised Statutes applies in all cases, unless otherwise provided in the particular act.

In the case of the State vs. Abraham, 139 La., 468, Mr. Chief Justice Monroe, as the organ of the court, in commenting upon Sec-

tion 980 of the Revised Statutes, said: "Probably the vast majority of offenders against the criminal laws are without visible assets through which the fines imposed upon them could be collected, and, if no means were provided for enforcing their collection, the sentence to pay a fine would be, in their ears, but as the tinkling cymbal and sounding brass. What the law has done, therefore, has been to provide that a fine shall be actually imposed, and in order that it shall be actually paid, has made the further provision that, if it be not paid, the convict shall be subjected to something worse, because of his default. That view of the matter has, apparently, been accepted by the lawmakers, the courts, and the bar during the greater part of the past century."

It is true that the legislature could have provided in the Hood Act that, in default of the payment of the fine, the convicted person should be imprisoned in the parish jail not more than sixty days. But the legislature has failed to do so. This, however, is no legal or good reason why convicted persons should evade the payment of such fines, as Section 980 of the Revised Statutes was enacted to supply a means of enforcing payment of a fine by imprisonment, in all cases in which a criminal statute of the state has omitted to provide for such enforcement by an alternative sentence. In such cases a criminal statute must be construed in reference to, and enforced [fol. 52] under, Section 980 of the Revised Statutes, as to payment of the fine unless otherwise provided in such statute. I know of no authority for splitting the primary imprisonment in a criminal statute into halves, or other fractions, in order to include under such imprisonment, and thereby enforce, the payment of a fine, in the absence of provision for an alternative period of imprisonment in the statute.

A fine is not a debt. It is a sum expressly imposed in lieu of, or in addition to, a term of imprisonment, or as any part of the punishment for an offense. State vs. Brannon, 34 An. 946; State vs. Joseph, 137 La. 533 State vs. McGuire, 152 La. 953.

The fine of $500 which has been imposed in this case is not in lieu of a term of imprisonment, but it is in addition to the term of imprisonment, and a part of the punishment for the offense of manufacturing intoxicating liquors. Can it be seriously contended that the legislature, after providing for punishment, both by fine and imprisonment, should have intended to relieve the person convicted under the Hood Act of that part of the punishment covered by the fine?

The Hood Act has completely failed to provide any additional punishment for the default in the payment of the fine, and such punishment must therefore be found under Section 980 of the Revised Statutes.

It is inconceivable to my mind that the legislature, should permit a fine as high as $500 to be imposed under the Hood Act, and, in addition to this fine, should provide imprisonment only for the light maximum limit of 60 days, and should have then intended to include in that petty term of incarceration the full punishment, both for the imprisonment actually inflicted, and also for the default in

the payment of a fine, which is so large as to be out of all proportion to a jail sentence so insignificant as a penalty, even if inflicted as a punishment for the fine alone.

[fol. 53] The Legislature of 1921 was well aware of the existence of section 980 of the Revised Statutes providing for imprisonment in default of payment of fine, and if it had been the intention of the law-making body to have excepted the Hood Act from the operation of that section of the Revised Statutes, a provision would have been inserted unquestionably, in said act fixing the limit of imprisonment in default of payment of fine; but this has not been done. The penalty for default in payment of fine in such cases has been left by the legislature under Section 980 of the Revised Statutes.

The Legislature of 1921, however, was careful to place specific provisions in the Hood Act relative to the punishment for second and subsequent violations, and to except that act from the operation of Section 974 of the Revised Statutes, a general law, by providing in said act a punishment for all second and subsequent violations, different from that contained in said section.

When an act makes no express provision for imprisonment in default of payment of a fine, such act cannot be said to be in conflict with Section 980 of the Revised Statutes, nor can it be logically contended that such section does not apply, as said Section applies only in case of the failure of an act to contain a provision for an alternative punishment, when a fine is not paid.

It is to be observed that the additional imprisonment imposed under Section 980 of the Revised Statutes is not a primary punishment under the Hood Act, or any other act, but it is a remedial statute, enacted and intended solely to enforce the payment of a fine already imposed as a penalty under an act, when such act has failed so to do.

The maximum limit of 60 days' imprisonment which may be imposed under the Hood Act is not an imprisonment in default of payment of the fine, but a primary imprisonment under the act itself, and is independent of and in addition to the fine. How then can it be seriously contended in this case that such maximum limit of imprisonment was intended to exclude punishment for default in payment of the fine?

[fol. 54] Under this section of the Revised Statutes this court has repeatedly held in liquor cases that imprisonment for a period not exceeding one year may be inflicted, in default of payment of fine, in addition to the imprisonment prescribed by the statute. State vs. Williamson, et al., 133 La. 1052; State vs. Boulanger, 134 La. 13; State vs. Hollingsworth, 134 La. 555; State vs. Payne, 134 La. 269.

This is the settled jurisprudence of this state, and I find nothing contained in the Hood Act in conflict therewith, as said act does not include any alternative punishment in default of payment of the fine, nor does its language purport in any way to amend or repeal section 980 of the Revised Statutes.

The effect of the opinion of the Court in this case is not only to take "the teeth" out of the State prohibition enforcement act, but it goes much further, and affects the efficient enforcement of other statutes of the state of a similar character, by virtually repealing

Section 980 of the Revised Statutes, and thereby making it legally impossible to enforce the collection of any fine imposed under a criminal statute in this state, unless such statute itself should expressly provide for imprisonment in default of payment of the fine.

This provision has been left out of many of the criminal statutes of the state by the Legislature, because, in its absence, Section 980 of the Revised Statutes, a general law, provided for the enforced collection of fines by imprisonment in default of payment.

The decision in this case renders less efficient the enforcement of all graded misdemeanors and minor offenses, because the acts in such cases have necessarily fixed the maximum fine, in obedience to the constitutional mandate.

The judgment in this case is, in my opinion, clearly erroneous and should be annulled and set aside.

I, therefore, respectfully dissent.

[fol. 55] IN SUPREME COURT OF LOUISIANA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 26, 1923

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Louisiana:

Now comes Appellant, Doras Hebert, through undersigned counsel, and with leave of this Honorable Court, respectfully represents:

1

That he desires to file this application for a rehearing of the above entitled and numbered cause for the reasons and errors assigned below:

Assignment of Error No. 1

This Honorable Court erred in refusing to maintain the plea to the jurisdiction of the State District Court, for the reason that the defendant had been indicted and placed under bond in the United States District Court for the Western District of Louisiana, a court of concurrent power and jurisdiction with that of the State Court, and a court of competent jurisdiction vested with superior authority to try and determine the issue involved, and because said ruling is contrary to decisions of this Honorable Court holding that: "When a criminal prosecution is commenced in a court of competent jurisdiction, there is no process by which it can be transferred to another court of concurrent jurisdiction, and what the prosecuting officer can not do directly, he should not do indirectly." State vs. Abraham, 139 La. Rep., page 466-469. See Original brief, pages 27-29.

Assignment of Error No. 2

The court further erred in holding that defendant and appellant was not entitled to an abatement of the proceedings in the State Court pending final disposition of the same offense in the Federal Court. United States vs. Wells, 28 Fed. Case, No. 1665.

[fol. 56] Assignment of Error No. 3

Because said decree violates the rule of comity between the Federal and State Courts.

16 Corpus Juris, page 161, Criminal Law, Section 185.

Assignment of Error No. 4

The court further erred in holding that the State of Louisiana is an independent sovereignity under the XVIII Amendment for the reason that its sovereign independence on the question of legislating on the subject of intoxicating liquors was destroyed by the XVIII Amendment and took away from the State, the right to "exercise supreme dominion and authority."

Assignment of Error No. 5

The court further erred in holding that the State had a right to take the same evidence to utilize the same search warrant executed by the Federal Government without regard to its legality as set forth on page 2 of said opinion, for the reason that the Hood Law, under Section 5, provides that all documents and property seized must be safely kept and produced, and makes the failure to do so a misdemeanor and fixes a penalty for failure to preserve the records subject to inspection at any time by the public.

Assignment of Error No. 6

This Honorable Court further erred in its decree regarding the said complaint of appellant in refusing to consider the special charges submitted to the court for the reason that the same involved a question of law as to whether or not under such admitted charges and facts an accused who was absent and never shown to have been connected with the alleged still was ever present, and whether or not he could be convicted for an offense which required an act of commission to constitute the same necessitating his actual presence, and because of the lack of any proof in the record that the defendant had manufactured any liquors whatsoever for beverage purposes.

2

Your appellant represents that the decree of this Honorable Court [fol. 57] as to the provisions of the Statute limiting the penalty of imprisonment for the first offense to not less than Ten days, nor more

than sixty days, is absolutely correct and beyond question, and your appellant does not apply for a rehearing on this point, but specially urges further error in said decree on the question of dual jeopardy and prosecution for the same offense and assigns as error, the following:

Assignment of Error No. 7

This Honorable Court erred in affirming the sentence of sixty days and Five Hundred ($500.00) Dollars fine, because under the law it amounts to dual prosecutions and jeopardy for the same offense in violation of Article 5 of the Constitution of the United States and the XIV Amendment, because it deprives him of his liberty without due process of law, and both directly and indirectly snatches your appellant from a court of competent jurisdiction, by which court he had already been indicted and the case fixed for trial as admitted in the record, and which case since the decision rendered herein has been fixed for trial in the Federal Court at Lake Charles, Louisiana, for December 17th, 1923, and he is thus deprived of his liberty without due process of law, and in violation of his constitutional rights, immunities and privileges. And, because said decree is in violation of the Bill of Rights of the Constitution of Louisiana for the year 1921, under Article 1, Section 2 providing: "No person shall be deprived of life, liberty or property, except by due process of law." Section 6 and Section 7 prohibiting unreasonable search and seizures, and Section 9 providing that no person shall be "twice put in jeopardy of life or liberty for the same offense."

3

Your appellant makes part hereof the original brief filed in this cause, and the authorities hereinabove cited and represents that both State and Federal questions are at issue in this cause, and that he should be granted a rehearing on the portions of the decision rendered and herein complained of.

Wherefore, your appellant prays that the foregoing motion [fol. 58] for a rehearing be filed; that upon due hearing that said rehearing be granted, and the judgment of the trial court be annulled in toto and the decree of this Honorable Court be set aside, and your defendant discharged without day.

For all legal orders and decrees necessary in the premises, for full, general and equitable relief.

Respectfully submitted, (Signed) Thos. Arthur Edwards, Attorney for Defendant and Appellant, Doras Hebert.

Copy served on opposing counsel for the State.

(Signed) T. A. Edwards.

[File endorsement omitted.]

IN SUPREME COURT OF LOUISIANA

ORDER GRANTING REHEARING—December 3rd, 1923

The Court (sitting En Banc) was duly opened pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harney F. Brunot, Paul Leche and David N. Thompson, Associate Justices.

No. 26,165

STATE OF LOUISIANA

vs.

HEBERT

No. 26,166

STATE OF LOUISIANA

vs.

BENOIT ET AL.

By the whole Court:

It is ordered that the rehearing applied for in these cases be granted.

IN SUPREME COURT OF LOUISIANA

ORDER CONTINUING CAUSE—January 7th, 1924

[fol. 59] The Court (sitting En Banc) was duly opened pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John St. Paul, Wynne G. Rogers, Harney F. Brunot and David N. Thompson, Associate Justices. Absent: John R. Land and Paul Leche, Associate Justices.

No. 26,165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26,166

STATE OF LOUISIANA

vs.

ALCEE BENOIT ET ALS.

On the motion of Mr. T. Arthur Edwards, counsel for the defendants, the court ordered these causes, which are fixed for the week

of January 14, 1924, to be continued, to be heard when the court again meets En Banc.

January 16, 1924.

The court was duly opened pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justices, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harney F. Brunot, Paul Leche and David N. Thompson, Associate Justices.

No. 26,165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26,166

STATE OF LOUISIANA

vs.

ALCEE BENOIT ET ALS.

These causes, not having been reached, were ordered by the Court to be continued until to-morrow, Thursday, January 17, 1924.

January 17th, 1924.

[fol. 60] The Court (sitting En Banc) was duly opened pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harvey F. Brunot, Paul Leche and David N. Thompson, Associate Justices.

No. 26,165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26,166

STATE OF LOUISIANA

vs.

ALCEE BENOIT ET AL

These causes, not having been reached, were ordered by the Court to be continued until to-morrow, Friday, January 18th, 1924.

January 18th, 1924.

The Court (sitting En Banc) was duly opened pursuant to adjournment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harney F. Brunot, Paul Leche and David N. Thompson, Associate Justices.

No. 26,165

STATE OF LOUISIANA

vs.

DORAS HEBERT

No. 26,166

STATE OF LOUISIANA

vs.

ALCEE BENOIT ET AL.

These two causes were called and ordered by the Court to be continued until the next hearing of En Banc cases, upon the written motion of Mr. T. A. Edwards, counsel for the defendants.

IN SUPREME COURT OF LOUISIANA

ARGUMENT AND SUBMISSION—February 11th, 1924

The Court (sitting En Banc) was duly opened pursuant to ad- [fol. 61] journment. Present: Their Honors Charles A. O'Niell, Chief Justice, and Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers, Harney F. Brunot, Paul Leche, and David N. Thompson, Associate Justices.

No. 26,165

STATE

vs.

DORAS HEBERT

(On Rehearing)

No. 26,166

STATE

vs.

ALCEE BENOIT et al.

(On Rehearing)

No. 26,145

STATE

vs.

WILBURN COOK et al.

(On Rehearing)

No. 26,296

STATE

vs.

MRS. A. G. GARLANDER

(On Rehearing)

These four causes came on to be heard and were argued by counsel. Mr. T. Arthur Edwards opened the argument for the defendants and appellants. Mr. T. Semmes Walmsley, Assistant Attorney General, replied for the State, appellee, and Mr. Edwards closed the argument. The Court then took the causes under advisement.

IN SUPREME COURT OF LOUISIANA

FINAL JUDGMENT—ON REHEARING—April 11th, 1924

The Court (sitting En Banc) was duly opened pursuant to adjournment. Present: Their Honors Ben C. Dawkins, Winston Overton, John R. Land, John St. Paul, Wynne G. Rogers and David N. Thompson, Associate Justices. Absent: Charles A. O'Niell, Chief Justice, and Harney F. Brunot and Paul Leche, Associate Justices.

His Honor Mr. Justice Dawkins pronounced the opinion and judgment of the Court in the following case:

No. 26,165

STATE OF LOUISIANA

vs.

DORAS HEBERT

(On Rehearing)

For the reasons assigned, our former decree is set aside, and the conviction and sentence appealed from are affirmed.

O'Niell, C. J., Rogers and Brunot, JJ., Dissent.

[fol. 62] IN SUPREME COURT OF LOUISIANA

[Title omitted]

OPINION ON REHEARING

DAWKINS, J.:

This case having been heard on rehearing by the entire court, we have concluded to adopt the views expressed in the dissenting opinion of Mr. Justice Land handed down when the case was first heard before Division "A", as they appear more nearly in accord with the jurisprudence. In doing so, we also wish to point out the differentiating features of the cases cited by the Chief Justice, in support of the conclusion reached in the opinion delivered by Division A. The three cases cited and relied upon by the Chief Justice, are: State ex rel. Tarquino vs. Arnault, Recorder, 49 An. 104; State vs. Voss, 40 (49) An. 444; and State ex rel. Daubert vs. Recorder, 52 An. 1079.

In Tarquino's case the accused was charged with violating an ordinance of the City of New Orleans, the penal provision of which read as follows:

"That whoever shall violate the provisions of this ordinance shall, upon conviction before the recorder within whose jurisdiction the offense is committed, be condemned by said recorder to pay a fine not to exceed twenty-five ($25.00) Dollars, or imprisonment in the parish prison for a term not to exceed thirty days, or both, *or imprisonment is said parish prison for a term not to exceed thirty (30) days in default of the payment of said fine; provided that the fine shall not exceed twenty-five ($25.00) dollars for each offense nor the imprisonment more than 30 (thirty) days.*"

The sentence imposed was to pay a fine of $25.00 and to serve thirty days in jail, and in default of paying the fine to thirty days additional imprisonment. This court simply held that the ordinance itself had in express terms, as indicated by the portions italicised above, limited the maximum period of imprisonment to thirty days.

In State vs. Voss, 49 Ann. 444, the ordinance under which Voss was prosecuted contained practically the identical provision quoted [fol. 63] above in the Tarquino case; but there the Judge had imposed a sentence of $25.00 and 10 days' imprisonment, and in default of paying the fine 20 days more. It was held that the limits of the ordinance had not been exceeded. The defendant had attacked the said penal section, claiming that it was ultra vires and illegal, because it permitted a greater imprisonment than 30 days for violating an ordinance of the City of New Orleans, and which was the limit fixed by the statute of the Legislature; and the court quotes the very language italicised above as fixing this limitation by the ordinance itself in conformity with the act.

And in State ex rel. Daubert vs. Arnault, the recorder had imposed a fine of $25.00 and 5 days in jail, with additional jail sen-

tence of 25 days in default of paying the fine. The court held, as in Tarquino's case, the maximum imprisonment could not exceed 30 days, because the statute (143 of 1898) authorizing the city council to pass penal ordinances permitted punishment "by fine or imprisonment, or both, or by imprisonment in default of payment of the fine, but in no case is the fine to exceed $25.00 and the imprisonment, all told, to exceed 30 days."

It will be noted that in all three cases, both the statute in its limitation, and the ordinances make specific provision for the failure to pay the fine, but expressly limit the imprisonment under all circumstances to 30 days.

In the case now before this court, involving the interpretation of Sec. — of Act #39 of 1921, no such alternative to enforce payment of the fine is found in the statute. Nor is there any such express limitation as appears in the ordinances and statutes considered in the cases just above referred to. Hence we think the lower court was correct in resorting to R. S. 980 in imposing an alternative jail sentence for failure to pay the fine.

For the reasons assigned, our former decree is set aside, and the conviction and sentence appealed from are affirmed.

O'Neill, C. J., Rogers and Brunot, JJ., Dissent.

[fol. 64] IN SUPREME COURT OF LOUISIANA

CLERK'S CERTIFICATE

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify the foregoing sixty-three (63) pages to be a true and correct transcript of the proceedings had in the 15th Judicial District Court, Parish of Jefferson Davis, in a certain suit wherein State of Louisiana, was the plaintiff, and Doras Hebert, was the defendant; and, also, of all the proceedings had in the Supreme Court of Louisiana on the appeal taken by the said defendant, which appeal is now on the files of this Court under the No. 26,165.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 11th day of June, Anno Domini, One thousand, nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. (Seal of Supreme Court of the State of Louisiana.)

[fol. 65] IN SUPREME COURT OF LOUISIANA

JUDGE'S CERTIFICATE TO CLERK

I, Charles A. O'Niell, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper hand-

writing of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 11th day of June, Anno Domini, One thousand, Nine hundred and twenty-four.

Charles A. O'Niell, Chief Justice Supreme Court of Louisiana.

(Seal of Supreme Court of the State of Louisiana.)

[fol. 66] IN SUPREME COURT OF LOUISIANA

CLERK'S CERTIFICATE TO JUDGE

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana do hereby certify that the Supreme Court of the State of Louisiana is the highest court of law in Louisiana, and that the Honorable Charles A. O'Niell is the Chief Justice of said Court and that his signature to the foregoing certificate is genuine.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 11th day of June, Anno Domini, One thousand, Nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. (Seal of Supreme Court of the State of Louisiana.)

[fol. 67] IN SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF ERROR AND ASSIGNMENTS OF ERROR

The petition and application of Doras Hebert, Alece Benoit, John Miller and Clobule Arabie, defendants herein, represented by undersigned counsel, with respect, represent:

1

That a final decree was entered in these causes on April 11th, 1924, on a rehearing before the whole Court, wherein and whereby the judgment of the District Court of Calcasieu Parish was affirmed, and unanimous decree of Division "A" of this Honorable Court on the 12th day of November, 1923 was set aside and the dissenting opinion of Justice Land of another separate division of this Court sustained, all of which are specially referred to and made part hereof.

2

Your relators show that action of this Honorable Court is contrary to the law and deprives them of their constitutional rights and privileges; that both Federal and State questions are involved in

these cases urged by relators in the District Court, and also in this Honorable Court, and that in order that said decision may be reviewed by the Honorable Supreme Court of the United States of America, your relators desire a Writ of Error from said Court to the Honorable Supreme Court of the State of Louisiana, to the end that said Federal and State questions may be reviewed, as likewise the constitutional questions involved in said cases, and for reasons therefor, assign the following assignment of error, to-wit:

Assignment of Error No. 1

This Honorable Court erred in holding that the State Court was authorized to take jurisdiction over the offense charged after the United States District Court had first apprehended said defendants, indicted them and fixed their cases for trial, as set forth in the exception to the jurisdiction and plea in bar and of abatement (Record p. 6-9). And the action of this Honorable Court was in violation of the provisions of the XVIII Amendment to the Federal Constitution and the National Prohibition Act, as likewise Article 5 (5th [fol. 68] Amendment) Federal Constitution, in that it deprives your defendants of liberty and property without due process of law, and likewise in direct violation of the Bill of Rights of the Constitution of the State of Louisiana, as embodied in Article 1 and various subsections thereof, in the Constitution of said State, for the year 1921.

Assignment of Error No. 2

This Honorable Court further erred in holding that the sentence imposed was legal and valid under Act 39 of La. Legislature for the year 1921, and particularly Section 3 of said Legislative Act, reading:

"Section 3. That any person who shall violate the provisions of this Act by manufacturing, or having in possession, for sale, or, by selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars, and be imprisoned not less than ten days nor more than sixty days, * * *."

because the statute limits both the fine and imprisonment "for the first offense," and for the reason that the remainder of said Section 3 of Act 39, La. Leg., of 1921, reading:

"And for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00), nor more than One thousand dollars ($1,000.00), and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this Act shall, upon conviction, be fined as herein above provided, or, may be imprisoned not exceeding the maximum limits herein above provided, or, may be both fine- and imprisoned, at the discretion of the Court."

because the first portion of said statute quoted actually, in plain language, limits the powers of the trial Court as to the sentence to be imposed for the first offense, which enables the Court to impose a maximum fine of not more than $500.00 and a jail sentence of not less than ten days, nor more than sixty days, which positively fixes both a minimum and maximum sentence with the discretion of the trial Court to impose the limit provided, and does not authorize any other sentence for the first offense, and specially provides a latitude to the trial court to impose an alternative sentence in the Parish Jail for not less than ten days nor more than sixty days in default of the payment of any fine imposed not exceeding $500.00; and this statute specially repeals Section 980 of the Revised Statutes of Louisiana on this subject matter, and any resort to said statute in an attempt to impose a fine exceeding $500.00 or in default of payment, by imprisonment beyond sixty days is a violation of the Federal and State Constitutional Rights and privileges of defendants, and particularly under the provisions of said constitutions above quoted, in that said decree of April 11th, 1924 deprives the defendants of the equal protection of the laws and of their prop-[fol. 69] erty and liberty without due process of law, therefore Relators have been illegally convicted. And, because the subsequent part of said Section 3 of Act 39 of La. Legislature of 1921 last quoted, specially provides an increased penalty over that provided in the first part quoted "for a second or subsequent offense", providing fine of not less than $100.00, nor more than $1,000.00, and imprisonment not less than thirty days, nor more than twelve months, and makes a special provision for any other violations of this law for first and second offenses. And, your relators make part hereof, the original decree of Division "A" of this Honorable Court, together with all the Bills of Exceptions contained in said record.

Assignment of Error No. 3

This Honorable Court further erred in its decree of April 11th, 1924, in holding that Revised Statutes of Louisiana, Section 980, reading:

"R. S., Sec. 980. Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year."

should govern and control in sentencing a defendant because such decree is judicial legislation and an encroachment by the judiciary upon the legislative branch of the State Government in violation of Article 11, and sub-sections 1 and 11, of the Louisiana Constitution for the year 1921, for the reason that said decree reads into said special statute, Act No. 39 of 1921, Section 980 of the Revised Statutes, and fails to uphold the plain provisions and legislative will set out in said Act 39 of 1921, because if said Act 39 of 1921 is not specific and definite in its terms, then said whole statute is unconstitutional, null and void for failure to provide for the imposition of any penalty whatever for its violations, and in such a case, this

Honorable Court cannot, by judicial interpretation, bring to its aid, in order to maintain its effectiveness, Revised Statutes of Louisiana, Section 980, because each Section and provision of said Act 39 of La. Legislature for the year 1921 is so interwoven that any part thereof, which proves ineffective, necessarily strikes the whole statute with nullity, and therefore said decree imposes an illegal, null and void sentence upon your defendants, and deprives them of their liberty and property without due process of law.

[fol. 70] Assignment of Error No. 4

This Honorable Court further erred in holding that the State of Louisiana could utilize evidence obtained by Federal Prohibition Agents under what defendants claim to be an illegal search warrant and on which said defendants were indicted in the Federal and State Constitutions, in that it compels defendants to incriminate themselves and any unlawful or illegal seizure or search, under said Federal Prohibition Act, is made a crime, as well as under Section XI of Article 1 of the Louisiana Constitution for the year 1921, and is a further violation of defendants' guarantees, rights, immunities and privileges under Article IV of the Federal Constitution prohibiting unreasonable searches and seizures. And the decree of this Honorable Court in upholding the right of the State to take advantage of any information illegally obtained by Federal Prohibition Agents and using said agents as witnesses without reference to whether their acts in serving warrants and executing searches and seizures were legal or illegal, and forced defendants, relators herein, to stand trial in the State Court while under duress imposed by said Federal indictments for the same offense clearly violated their Federal and Constitutional Rights as set forth, and particularly Articles IV and V of the Federal Constitution, as likewise Section VII of Article 1 of the Louisiana Constitution for the year 1921, reading:

"Section 7. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no such search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

because said action of the State of Louisiana placed your relators in duress and denied them their constitutional rights and privileges against dual prosecutions and against being held in duress and which action on the part of the said State, constituted duress in violation and controvention of their Federal and State Constitutional rights, privileges and immunities.

Assignment of Error No. 5

That this Honorable Court further erred in its decree in maintaining the right of the State of Louisiana to usurp jurisdiction of the subject matter of these cases while they were in duress and al-

ready under indictment in the Federal Courts for the same offense (Record p. 5), which said United States District Court was first seized [fol. 71] of jurisdiction and exclusive rights under the XVIII Amendment, and which action of the State of Louisiana was arbitrary, illegal and in direct violation of Article V of the Constitution of the United States of America, providing that no person shall be subject for the same offense to be twice put in jeopardy, nor deprived of life, liberty or property, without due process of law, and also in direct violation of Article V of the Constitution of the United States of America, providing that no person shall be subject for the same offense to be twice put in jeopardy, nor deprived of life, liberty or property, without due process of law, and also in direct violation of the Bill of Rights embodied in Article 1 of the Constitution of the State of Louisiana for the year 1921, and particularly Section 2 thereof, providing: "No person shall be deprived of life, liberty or property, except by due process of law, * * *," and, particularly in violation and contravention of the last provision of Section 9 of said Article reading:

"Nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."

And, further Error, because the XVIII Amendment destroyed the rights of the State of Louisiana as an Independent Sovereignty with reference to legislative action by the State regarding Liquor or Prohibition, merely reserving to the States the right to exercise "concurrent power" to enforce said Amendment, and likewise the same reservation in the National Prohibition Laws providing that the several States "May enact legislation only in aid of prohibition," which means nothing more than that the States might enact a law authorizing State officers to apprehend persons violating the National Prohibition Laws and surrender them to the Federal Government for indictment and prosecution. This is true, because it avoids Dual Prosecutions for the same offense, and did not violate or contravene Federal and State Constitutions which in plain terms, prohibit dual prosecutions for the same offense; and, therefore, does not grant States the right to go beyond that limitation and enact Independent Laws on the subject with penalities, fines and forfeitures, and divests State Courts of jurisdiction.

3

Your relators make part of this application and petition for Writs of Errors, the entire record in said causes, applicable to the questions herein raised, as likewise the original decree of Division "A" of this Honorable Court, and the final decree of April 11th, 1924, as likewise dissenting opinion and specially urge herein that the Statute under which said illegal sentences have been imposed cannot be enlarged upon by judicial interpretation as embodied in said final

decree, and your relators aver that they are entitled, under the Constitution of the United States of America and its Laws, as likewise [fol. 72] the Constitution and Laws of the State of Louisiana to a Writ of Error to the Honorable Supreme Court of the United States, for the reasons and errors hereinabove set forth and assigned.

4

Your relators further show that they have exhausted their remedies before this Honorable Court as a result of said final decree of April 11th, 1924, and that there is no other remedy or recourse than the granting of Writs of Error herein by this Honorable Court.

5

That your relators and defendants annex hereto, their affidavits, together with certificate of their counsel of record, as in such cases made and provided.

Wherefore, your relators and defendants pray that this Honorable Court do grant a Writ of Error from the Supreme Court of the United States of America, directed to the Honorable Supreme Court of the State of Louisiana, directing that the record in these cases be ordered up for review by the Honorable Supreme Court of the United States of America, and that due notice of said Writ be served upon the State of Louisiana, through the Attorney-General and its proper officials, upon said relators and defendants herein furnishing bond, and complying with the provisions of law, and said decrees annulled, with discharge of Relators.

For all such further necessary legal orders and decrees as they may be entitled to under the Constitution and Laws of the United States of America and Constitution and Laws of the State of Louisiana; for full, general and equitable relief.

Thos. Arthur Edwards, Attorney and Counsel for Relators and defendants.

STATE OF LOUISIANA,
Parish of Calcasieu:

Thomas Arthur Edwards, being duly sworn, deposes and says:

That he is the attorney of record for the relators in the foregoing application for Writs of Errors; that said Writ is not for the purpose of delay and that in his opinion, important constitutional questions, both Federal and State, are involved, and that a Writ of Error is the [fol. 73] only remedy available to said relators.

Thos. Arthur Edwards.

Sworn to and subscribed before me at Lake Charles, Louisiana, this 15th day of April, A. D., 1924. Sam Kushner, Notary Public. (Seal Sam Kushner, Notary Public, Calcasieu Parish, La.)

IN SUPREME COURT OF LOUISIANA

ORDER ALLOWING WRIT OF ERROR

The foregoing petition and assignment of errors having been read and considered: It is ordered that a writ of error, to act as a supersedeas, be and the same is hereby granted upon petitioners' furnishing bond, with good and solvent surety in the sum of One Thousand ($1,000.00) dollars each.

New Orleans, La., June 2nd, 1924.

Charles A. O'Niell, Chief Justice Supreme Court of Louisiana.

(Seal of the Supereme Court of the State of Louisiana.)

Service of the above and foregoing Petition, assignment of error and order is hereby accepted and citation waived.

Percy Saint, Attorney General. Percy L. Ogden, Assistant Attorney General.

New Orleans, La., June 2, 1924.

[fols. 74-77] Jurats showing the foregoing was duly sworn to by Doras Hebert, Alcee Benoit, John Miller, Clobule Arabie omitted in printing.

[fols. 78 & 79] BOND ON WRIT OF ERROR FOR $1,000—Approved and filed June 4, 1924; omitted in printing

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[fol. 80] IN SUPREME COURT OF LOUISIANA

WRIT OF ERROR—Filed June 2, 1924

The President of the United States of America to the Honorable the Judges of the Supreme Court of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Doras Hebert, Alcee Benoit, John Miller and Clobule Arabie, plaintiffs-in-error vs. State of Louisiana, Defendant-in-error, Nos. 26,165 and 26,166, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of the clause of the Constitution, or of a treaty, or statute of, or commission held under the United [fol. 81] States, and the decision was against the title, right, privilege,

or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Doras Hebert, Alcee Benoit, John Miller and Clobule Arabie, plaintiffs-in-error, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable, William Howard Taft, Chief Justice of the Supreme Court of the United States, the 2nd day of June, in the year of our Lord one thousand nine hundred and twenty-four.

H. J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana. (Seal of the Dist. Court of the United States for the Eastern District of Louisiana.)

Allowed by Charles H. O'Niell, Chief Justice Supreme Court of Louisiana. (Seal of the Supreme Court of the State of Louisiana.)

[File endorsement omitted.]

[fol. 82] IN SUPREME COURT OF LOUISIANA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed June 2, 1924

Whereas, in view of the fact that the same constitutional questions and questions of law are involved in each of the above cases, in which a writ of error has been granted from the Honorable Supreme Court of the United States to the Honorable Supreme Court of the State of Louisiana, as per order of the Chief Justice of the Supreme Court of Louisiana, dated June 2, 1924, the writs having been issued out of the Federal Court accordingly, and,

Whereas, in order to avoid a voluminous record, it is agreed between the State of Louisiana, herein represented by the Honorable Attorney General and Thos. Arthur Edwards, counsel for the defendants and complainants in said writs, Doras Hebert, John Miller, Alcee Benoit, and Clobule Arabie, it is agreed that the record of the Supreme Court in No. 26,165, State of Louisiana versus Doras Hebert, only, shall be sent up for printing and submission to the Honorable Supreme Court of the United States of America, and that the de-

cision in the Hebert case shall apply to the other complainants and defendants named, and that the writ granted shall act as a supersedeas and stay in all cases, until final decision of said cause by the [fol. 83] United States Supreme Court, and the Clerk of the Supreme Court of the State of Louisiana will withhold and retain the mandates until said final decree of the United States Supreme Court.

It is further agreed that all opinions of the Honorable Supreme Court of the State of Louisiana, as likewise dissenting opinions, shall form part of said record.

Thus done and signed officially at New Orleans, Louisiana, on this the second day of June, 1924.

(Signed) Percy Saint, Attorney General. Percy T. Ogden, Assistant Attorney General. Thos. Arthur Edwards.

[File endorsement omitted.]

[fol. 84] IN SUPREME COURT OF LOUISIANA

CERTIFICATE OF LODGMENT

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that there was lodged with me, as such clerk, on June 2nd, 1924, in the matter of Doras Hebert, Alcee Benoit, John Miller and Clobule Arabie, Plaintiffs-in-error vs. State of Louisiana, Defendant-in-error:

1st. The original application and petition for writ of error and assignment of errors, as herein set forth.

2nd. The original writ of error, as herein set forth.

3rd. Two copies of the writ of error, one copy to be served on the defendant-in-error, and one copy to be lodged in my office.

4th. Agreement of Counsel, a copy of which is herein set forth.

I further certify that there was lodged with me, as such clerk, in the same entitled cause, on June 4th, 1924:

1st. Bond for writ of error, a copy of which is herein set forth.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 11th day of June, Anno Domini, one thousand, nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. (Seal of Supreme Court of the State of Louisiana.)

[fol. 85] IN SUPREME COURT OF LOUISIANA

RETURN TO WRIT

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto sign my name and affix the seal of the court aforesaid, at the city of New Orleans, this the 11th day of June, Anno Domini, One thousand, nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. (Seal of Supreme Court of the State of Louisiana.)

[fol. 86] IN SUPREME COURT OF LOUISIANA

[Title omitted]

PETITION FOR WRITS OF CERTIORARI AND PROHIBITION—Filed June 14, 1923

[fol. 87] To the Honorable Charles A. O'Niell, Chief Justice of the Supreme Court of Louisiana, and the Honorable Associate Justices of said Court:

The petition and application of Doras Hebert, a resident of Jefferson Davis Parish, State of Louisiana, with respect represents:

I

That on or about the 11th day of May, 1923, he was arrested and placed under bond for an alleged violation of the National Prohibition Laws, to-wit: Charged with manufacturing intoxicating liquors, and with unlawful possession of intoxicating liquors in the United States District Court, Western District of Louisiana, Lake Charles Division; that on May 21, 1923, he was indicted by said Federal Court on said charges, and his case fixed for trial for the 28th day of May, 1923.

That on the 3rd day of June, 1923, the Grand Jury for the Parish of Jefferson Davis, State of Louisiana, returned an indictment against your relator for the same crimes above set forth, embracing the same transaction, under the provisions of Act No. 39, of the Louisiana Legislature of 1921, and your relator was again arrested and placed under additional bond to meet said charges in the District Court of the Parish of Jefferson Davis;

All of which will more fully and at large appear by statement of facts agreed upon, hereto attached and made part hereof, marked Exhibit "A."

2

Your relator further shows that on the 11th day of June, 1923, he filed a plea to the jurisdiction and plea in Bar of the prosecution of the same charge in the State Court, and objected to proceeding of any character on the grounds set forth in his motion, hereto attached, made part hereof, marked Exhibit "B."

3

That your relator also annexes hereto, true copies of the indictments returned against him in the Parish of Jefferson Davis, No. 1328, wherein he is charged with unlawful possession of intoxicating [fol. 88] liquors, and No. 1329, wherein he is charged with unlawful manufacture of intoxicating liquors, said indictments being duly certified by Clarphy Pitre, Esq., Clerk of Court, and which are annexed hereto and made part hereof, marked Exhibit "C" and "D," respectively.

Your relator further shows that on the 11th day of June, 1923, the trial Judge, Honorable Thos. F. Porter, Jr., overruled the objections, exceptions and demurrer of your relator, wherein and whereby the jurisdiction of the State Court was attacked under Sec. 2 of the XVIII Amendment to the Constitution of the United States of America, and under the plea of dual prosecution for the same offense, under the terms and provisions of Section 5 of the XIV Amendment to the Constitution of the United States of America, and of the Bill of Rights under Article 1, Section- 2, 6, 7 and 9 of said Art. of the Constitution of the State of Louisiana for the year 1921, prohibiting the trial of a person twice for the same offense; that the said trial Judge arbitrarily and illegally overruled the objections and exceptions of your petitioner, in violation of his legal rights and in direct violation of his Constitutional rights, privileges and immunities above set forth, guaranteed to him by the Federal and State Constitutions.

5

Your relator shows that the Federal Court, having first assumed and actually become seized of jurisdiction of the crimes charged against your relator, having apprehended him and placed him under bond, and having duly indicted him and fixed his case for trial, the State Court is without jurisdiction, or power to try and determine the charges against your relator admitted to be the same transaction, and the same offense until the original court, to-wit: The United States District Court of the Western District of Louisiana, a court of competent jurisdiction, previously having taken cognizance of the offense charged, assumed jurisdiction and becoming seized of jurisdiction of said offenses, the State Court is without legal right to proceed with the trial of his said cases until after relinquishment by the Federal Court, determination of the prosecution therein, because:

(a) Section two of the XVIII Amendment to the Constitution [fol. 89] of the United States of America, provides that "Congress and the several States shall have concurrent power to enforce this Amendment," and therefore, the said Federal and State Courts, having concurrent power which means equal or co-ordinate power, the first court assuming jurisdiction of the said subject matter, or crime charged, must retain said jurisdiction until final determination of the cause.

(b) Because the power to enact such legislation on behalf of Congress, as embodied in the National Prohibition Acts or Volstead Law, as likewise as set forth in Act 39, of 1921, known as the Hood Law, derive their powers directly from said XVIII Amendment, and which Amendment necessarily in providing "concurrent power to enforce this Article" was not intended to permit two prosecutions of the same offense, one by the Federal Court and one by the State Court, because it says, "concurrent power" and not exclusive jurisdiction in either of said courts; "and because the authorization to the State Court was in aid of Federal Legislation, and not an exclusive right or grant of power to the State of Louisiana, but merely a concurrent or co-ordinate power, and this for the reason that had it been the intendment of the XVIII Amendment to permit dual prosecutions, or two prosecutions for the same crime, one by the State Court, and one by the Federal Court, then the 2 Section of the XVIII Amendment would have said in plain terms that a person may be prosecuted twice by indictment in both the Federal and State Courts, and would have eliminated from said Section 2, the word "concurrent," and made said second section read, "the Congress and States shall have jurisdiction to enforce this Amendment." That to permit two prosecutions for the same offense would be class legislation in favor of offenses against prohibition.

(c) Because said procedure is contrary to our Constitutions and form of free government, and violates the comity existing and recognized between courts, and to hold that a person may be indicted and sentenced by both of said courts for one offense, would make the status of a citizen too uncertain, and place him constantly in jeopardy;

(d) Because under the provisions of Section 2 of the XVIII Amendment, the powers delegated to Congress and to the several States to enforce said amendment, and authorizing States by said amendment and subsequent act of Congress regulating and enforcing prohibition, merged the two sovereignties and on this particular subject, the State of Louisiana as a subordinate political subdivision, lost its identity as a separate sovereignty, and is subordinate to the United States District Court, after it has assumed jurisdiction and become seized of jurisdiction in a particular case, because the court's power in the State, since the XVIII Amendment, is derived from said amendment and the provisions in the National Prohibition acts "authorizing the several States to enact Legislation in aid thereof.

6

Your relator shows that all proceedings had up to the filing and overruling of motion and exception to jurisdiction and plea in bar, were without prejudice to defendant, as likewise any subsequent action by defendant in appearing in said State Court, and that defendant gave notice in open Court of his intention to apply to the Honorable Supreme Court of the State of Louisiana for writs of certiorari and prohibition to restrain the Honorable Thos. F. Porter, Jr., trial Judge, from proceeding with the trial of said cases.

[fol. 90] 7

Your relator further shows that said cases against him have been fixed for trial for Saturday, June 16th, 1923, and that the Honorable Thos. F. Porter, Jr., trial Judge, stated in open court and notified counsel and defendant, that he would proceed with the trial of said cases on said date, unless the writs applied for herein is granted by this Honorable Court. Therefore, it is urgent that the Honorable Supreme Court would act upon the writs herein applied for with the least possible delay.

8

Your relator evers that the action of the trial Judge is manifestly, arbitrary, illegal and in direct contravention and in violation of his constitutional rights and immunities hereinabove set forth; that defendant has not acted voluntarily in said proceedings, but has at all times, protested against the same, and he avers that he has no other remedy at law, otherwise than by way of writ of certiorari and prohibition for the reason that under the Statutes of the State under which he has been indicted, the penalty can be less than sufficient to warrant a direct appeal, and that he fears that unless he applies for said writs, he may be precluded by any remedy through an appeal.

9

Your relator shows that he should have an opportunity to properly present the questions herein to this Honorable Court by way of brief and oral argument, but avers that under the pressing circumstances, he is unable to do so.

10

Your relator, with the consent of the Honorable Thos. F. Porter, Jr., trial Judge, annexes hereto, marked Exhibit "E," the acceptance of the trial Judge, waiver of notice and statement as to the correct procedure before him with reference to the subject matter of this application.

Your relator further avers that unless the trial Judge is restrained and prohibited from proceeding in said cause, he will suffer [fol. 91] irreparable injury, and that he will not have any legal remedy whatsoever to protect his rights subsequently in this or in any other court; that this application is not made for the purpose of delay.

Wherefore, your relator, Doras Hebert, respectfully prays this Honorable Court to grant him a writ of Certiorari and Prohibition herein, reviewing the action of the Honorable Thos. F. Porter, Jr. trial Judge, in overruling the exceptions to jurisdiction and plea in bar filed herein:

Respectfully prays that a writ of Certiorari and Prohibition issue herein directed to the Honorable Thos. F. Porter, Jr., trial Judge, ordering the record in this case transmitted to the Supreme Court, and commanding him to Stay proceedings of every nature in these cases, subject to the further orders of this Honorable Court.

That an order issue by this Honorable Court directing and commanding the said trial Judge to show cause if any he have, on a day to be fixed by this Honorable Court, why said motions and exceptions should not be sustained, and the jurisdiction of the Federal Courts recognized; and, in the alternative, why the plea in bar should not be sustained, pending the final determination of said indictments now pending against relator and defendant in the United States District Court, for the Western District of Louisiana.

For all legal orders and decrees necessary in the premises, for full, general and equitable relief.

(Signed) Thos. Arthur Edwards, Attorney for Relator and Defendant, Doras Hebert.

I hereby certify that due notice was given the trial Judge and the District Attorney in open court of intentions to apply for the said writs, and that copies hereof have been served upon said officials; and further certify that said writs were not applied for with the view of delay, but because of the substantial, constitutional and legal rights of the defendant, being jeopardized by reason of the action of the trial Judge.

(Signed) Thos. Arthur Edwards, Attorney-at-law for Relator, Doras Hebert.

[fol. 92] Jurat showing the foregoing was duly sworn to by Doras Hebert, omitted in printing.

[fol. 93] EXHIBIT "A" TO PETITION FOR CERTIORARI

[Title omitted]

It is admitted for the purposes of the exception to jurisdiction and plea in bar in the above cases:

(1) That each of said defendants have been arrested and indicted in the United States District Court, Lake Charles Division, Western District of Louisiana for the same crime, embracing the same dates and the same transaction; that they are now under bond for their appearance in said court; that said arrests and indictments were prior to the indictments returned in the State Court.

(2) That said cases in the U. S. District Court were fixed for trial for May 28th, and the term of court postponed; that said indictments in the Federal Court are still pending and said defendants are awaiting trial.

(3) It is further admitted that neither of said defendants have yet been tried and convicted, or acquitted in the United States District Court.

A true copy. Jennings, La., June 12th, 1923.
(Signed) Clarphy Pitre, Clerk of Court. (Seal.)

[fols. 94-96] EXHIBIT "B" TO PETITION FOR CERTIORARI; EXCEPTION TO JURISDICTION—Omitted; printed per page 6, ante

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[fol. 97] EXHIBIT "C" TO PETITION FOR CERTIORARI, BILL OF INDICTMENT—Omitted; printed per page 4, ante

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EXHIBIT "D" TO PETITION FOR CERTIORARI

STATE OF LOUISIANA,
Parish of Jefferson Davis:

In the name and by the authority of the State of Louisiana:
The Grand Jurors of the State of Louisiana, duly empaneled, sworn and charged to enquire within and for the Parish of Jefferson Davis, State aforesaid, upon their oath do present, That Doras Hebert, at the Parish of Jefferson Davis on the 11th day of May in the year of our Lord, one thousand nine hundred and Twenty-three, did unlawfully possess intoxicating liquor for beverage purposes, contrary to the form of the Statute of the State of Louisiana, in such cases made and provided, in contempt of the authority of said State, and against the peace and dignity of the same.

John J. Robira, Asst. District Attorney, Fifteenth Judicial District of Louisiana.

[fol. 98] Endorsed on reverse: State of Louisiana vs. No. 1328 Doras Hebert.—Charge: Poss. Intoxicating Liquor for beverage purposes.—A true bill.—Phillip Miller, Foreman of the Grand Jury.—A true copy this 5th day of June, 1923.—(Signed) Clarphy Pitre, Clerk of Court. (Seal.)

EXHIBIT "E" TO PETITION FOR CERTIORARI

[Title omitted]

No. 1328 and 1329 Consolidated for the Purpose of This Writ

Charges: Unlawful Manufacture and Possession of Intoxicating Liquors

I hereby accept service, waive notice and delay with reference to the application of defendant for writs of Certiorari and prohibition herein.

I further certify that said appearances by the defendant were under protests, and without prejudice, and that the attached minutes of court are incorrect in so far as they fail to so state such facts, and also wherein they fail to state that said writs were applied for in open court, and notice given thereof.

I further certify that notice has been given defendant and his counsel that unless writ is acted on by Saturday, June 16, 1923, trial of the cases will be proceeded with.

Witness my official signature at Lake Charles, Louisiana, this 13th day of June, A. D. 1923.

(Signed) Thos. F. Porter, Jr., District Judge 15th Jud. District Court of Louisiana.

[fol. 99] EXHIBIT "E"-2 TO PETITION FOR CERTIORARI

Monday, June 11th, 1923.

Court met according to adjournment, His Honor Thos. F. Porter, Jr., Judge Presiding, with L. Z. Toups, Deputy Clerk of Court and J. H. Martin, Deputy Sheriff, in attendance.

Minutes of Friday, June 8th, 1923, read and approved.

[Title omitted]

The Asst. Dist. Atty. being present in Open Court, as also the accused, personally and thru Counsel T. Arthur Edwards, Esq., now withdraws his plea of not guilty and thru his counsel now files Exception to the Jurisdiction of the Court.

Exception Called, Argued and Submitted. Whereupon the Court overrules the Exception.

To which ruling counsel for defendant excepts.

Counsel for defendant prays for a Bill of Particulars.

Whereupon the Court grants the prayer for Bill of Particulars in so far as paragraph A and B are concerned and orders that the Dist. Atty. must set out where the liquor was manufactured or possessed. Counsel for defendant excepts to that ruling of the court which does not include all the Particulars prayed for.

To the bar comes the defendant and personally and thru counsel, waives formal-y and pleads not guilty. On motion of Asst. Dist. Atty. these cases are fixed for Saturday, June 16th, 1923.

I hereby certify that the above and foregoing is a true copy of the Extracts of the Minutes of Court of the Parish of Jefferson Davis, 15th Judicial District Court of Louisiana, in the above numbered and entitled cause.

Jennings, Louisiana, June 12th, A. D. 1923.

(Signed) L. Z. Toups, Dy. Clerk of said Court. (Seal.)

[fol. 100] | File endorsement omitted. |

[fol. 101] IN SUPREME COURT OF LOUISIANA

CLERK'S CERTIFICATE

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify the foregoing fourteen (14) pages to be a true and correct copy of an application for writs of certiorari and prohibition filed in this, the Supreme Court of Louisiana, on the 14th day of June, 1923, in the cause entitled State of Louisiana vs. Doras Hebert, which application bears the No. 26,067 of the docket of the Supreme Court of Louisiana, and which application for said writs was refused by this Court on the 15th day of June, 1923.

In witness whereof, I hereunto sign my name and affix the seal of the Court aforesaid, at the city of New Orleans, this the 24th day of June, Anno Domini, One thousand, nine hundred and twenty-four.

Paul E. Mortimer, Clerk Supreme Court of Louisiana. (Seal of the Supreme Court of the State of Louisiana.)

Endorsed on cover: File No. 30,519. Louisiana Supreme Court. Term No. 554. Doras Hebert, Alcee Benoit, John Miller and Clobule Arabie, plaintiffs in error, vs. State of Louisiana. Filed July 24, 1924. File No. 30,519.

(16)

Office Supreme Court, U. S.
FILED
SEP 20 1926
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 24

Assigned for October 11, 1926.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER AND CLOBULE ARABIE,
Plaintiffs in Error,

versus

STATE OF LOUISIANA,
Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

ORIGINAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

A. R. MITCHELL,
Attorney for Plaintiff in Error.

THOS. ARTHUR EDWARDS,
Of Counsel.

MONTGOMERY-ANDREE PRINTING CO., INC., 307 CHARTRES, N. O.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 554.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER AND CLOBULE ARABIE,
Plaintiffs in Error,

versus

STATE OF LOUISIANA,
Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

ORIGINAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

SYLLABUS.

1. The Federal Court has exclusive jurisdiction of all offenses cognizable under the authority of the United States.

   Federal Judicial Code, Section 256, Paragraphs 1 and 2.

2. Where a special statute of a State provides special penalties and limits the fine and imprisonment, and the Supreme Court of the State maintains a sentence under a general law imposed in excess of that provided in said special statute, the defendant is deprived of his liberty without due process of law, in violation of the XIV Amendment of the Federal Constitution.

Hebert v. State of Louisiana and authorities cited in brief.

3. The United States Supreme Court has final jurisdiction over all matters arising under the XVIII Amendment, and in such case will review a decision of a State Court where a sentence not warranted under the law has been imposed, as it tends to deprive the defendant of his liberty and property without due process of law.

Hebert v. State of Louisiana and authorities cited in brief.

STATEMENT—INDEX.

This case is before this Honorable Court on a writ of error, and references made are to pages of printed record.

(a) Plaintiff in error was convicted (Sentence, R., 3) in the State Court after having first been apprehended and indicted in the Federal Court for the Western District of Louisiana. (R., 4.)

(b) Exceptions to jurisdiction were filed in the State Court. (R., 4, 5, 6.)

This exception invoked the provisions of the Bill of Rights, Article I of the Constitution of Louisiana, year 1921; the IV, V, VI and XIV Amendments of the Constitution of the United States.

Paragraphs 1 and 2 of Section 256 of the Federal Judicial Code providing for *exclusive jurisdiction over all crimes and offenses cognizable under the authority of the United States.*

(c) The original opinion of the Court reversing the District Court in part. (R., 24-30.)

(d) The prosecution in the State Court was based upon Act No. 39, Louisiana Legislature, for the year 1921. (R., 31.)

(e) The alternative plea of plaintiff in error was the excessive and illegal sentences imposed for the first offense. (Assignments of Error R., 45-50.)

(f) Dissenting opinion of Mr. Justice Land appears in R., 32.

(g) Rehearing was granted (R., 39).

(h) On rehearing the original opinion was set aside by the whole Court. (R., 43.)

(i) By stipulation of counsel (R., 52-53) "all opinions of the Honorable Supreme Court of Louisiana, as likewise dissenting opinions, shall form part of the record."

(j) Three of the Justices of the State Supreme Court dissented from the final opinion, to-wit:

Chief Justice Charles A. O'Niell, Justice Brunot and Justice Rogers. (R., 44.) Under the stipulation, page 53, the dissenting opinion of Chief Justice O'Niell was made part of the record, but through error has been omitted.

(k) The case is reported in *158 Louisiana Reports (103 So., 742)*. The dissenting opinion of Chief Justice O'Niell appears in the *158 Louisiana Reports, pages 229, et seq.*, and we believe we are at liberty to consider this dissenting opinion as part of this record the same as if embraced herein.

(l) The Assignments of Error are restated (Record, pages 36-38).

SPECIFICATION OF ERRORS.

The contentions of plaintiff in error are:

First: That the State Court could not usurp jurisdiction already acquired by the Federal Court (Sec. 256, Fed. Jud. Code).

Second: The Constitution and laws of the United States are the supreme law of the land. (Clause 2, Art. VI, Fed. Const.)

Third: The question of double jeopardy under Amendment V, Federal Constitution, and companion articles of State Constitution.

Fourth: The illegal sentences imposed for the "first offense" and not authorized by the statute, which seeks to deprive plaintiff in error of his liberty without due process of law, in violation of the Fifth Amendment to the Federal Constitution and the XIV Amendment.

Fifth: The question of a State being an independent sovereignty in view of the 18th Amendment restricting State sovereignty.

Sixth: Title IV, supplemental provision of the National Prohibition Act, and particularly Section 10138 4/5c Re Criminal Code U. S. Compiled Statutes, 1923, p. 699, being an Act of Congress as amended by Act of Congress November 23, 1921, prohibiting dual prosecution for the same offense, and conviction under one law bars prosecution under another.

Seventh: That the State of Louisiana went beyond the statute in imposing an unauthorized penalty

for the first offense, specially provided by the statute, in calling to the aid of said special law a general statute, Section 980, Revised Statutes of the State of Louisiana, in order to impose the alternative fine and jail sentences which clearly deprives plaintiff in error of his liberty and property without due process of law, and denies him equal protection of the laws.

Eighth: Appellate jurisdiction of this Honorable Court is further invoked under the provision of Section 237 of the Federal Judicial Code as amended by Act of Congress February 13, 1925, for the reason that the final judgment of the State Supreme Court is repugnant to the Constitutional provisions of the United States and the laws thereof, under the XIV Amendment and the laws of Congress enacted under Section 5 of said XIV Amendment.

Ninth: Lack of sufficient evidence and denial of fair and impartial trial.

Tenth: That the Federal questions were raised on the original trial in the State Courts. (See Exceptions to Jurisdiction, R., 4.)

BRIEF STATEMENT OF FACTS.

The facts briefly stated are that plaintiff in error and others were separately indicted after a raid by Federal Prohibition Agents on their various private dwellings with search warrants that were contended to be illegal, but the complaint ignored by the State Court, which facts are embodied largely in the various bills of exceptions retained in State Court appearing (R., 12 to 20, inclusive).

As above shown, the Honorable Supreme Court of Louisiana sustained the lower trial Court on final judgment, but set aside the illegal and unauthorized sentences. The Supreme Court of Louisiana was then sitting in three divisions, and Justice Land of another division, who had not heard the argument and to whom the case had not been presented, of his own volition, filed a dissenting opinion, and the whole Court then heard the case, with the result that a final decree was entered sustaining the lower trial Court, and to which decree the Chief Justice and two other Justices dissented, and Chief Justice Chas. A. O'Niell wrote the dissenting opinion which has been referred to in the *158 La. Rep., pages 229, et seq.*

Thereupon a writ of error, in due course, was granted for review by this Honorable Court of the questions involved. (R., 51.)

ARGUMENT.

May It Please this Honorable Court:

We realize that the task before us is a difficult one, but being impressed with the old principles of Constitutional law and justice as against the modern trend of our eminent courts of justice, in their conscientious efforts to maintain the Constitution and the rights of its citizens, even in the face of radical legislation, both National and State, seeking to restrict the rights, privileges and immunities of the people, we presume to assert that we are within the scope of our professional obligations in seeking the relief sought to be obtained in the case at bar.

The contention of plaintiff in error is that in so far as counsel have been able to ascertain there has been no case before this Honorable Court wherein the provisions of paragraphs 1 and 2 of Section 256 of the Federal Judicial Code has been interpreted with reference to its application to cases arising as a result of the 18th Amendment, National Prohibition legislation and State legislation. Section 256 of said Code was in force prior to and was re-enacted by Act of Congress February 13, 1925, since the 18th Amendment and the National Prohibition legislation. This re-enactment was without modification or restriction in so far as its force applies in vesting the Federal Courts with jurisdiction exclusive of the Courts of the several States.

We contend that the decision of the Honorable Supreme Court of Louisiana is repugnant to and in conflict with the Supreme Law of the Land as pronounced by Congress and as declared under Clause 2 of Article

VI of the Federal Constitution, as likewise the V, VI and XIV Amendments of the Constitution of the United States.

We further contend that the Constitutional questions involved places us within the scope of Section 237 of the Federal Judicial Code as amended by Act of Congress February 13, 1925, subdivisions (a), (b) and (c), vesting this Honorable Court with jurisdiction to review the decision of the Honorable Supreme Court of Louisiana, even though said latter Court has decided the questions adversely to our contention.

Standard Oil Company v. Graves, 249 U. S., 389, 39 S. Ct., 320, 63 U. S., 662.

It will be noted that under the Bill of Rights embraced in the Constitution of the State of Louisiana for the year 1921, Article I, Section 1, Section 2, Section 6, Section 7, Section 9, Section 10, Section 11, and Section 12, in substance, announce the same principle as to double jeopardy, due process of law, search and seizure, fair and impartial trial, etc., as guaranteed under the companion articles of the Constitution of the United States of America.

The defendant in error no doubt relied upon the decision of this Honorable Court of *United States v. Lanza, 260 U. S., 377, 43 S. Ct., page 141*, as decisive. Our reading of this case throws no ray of light that would exclude our contentions as to the application of Section 256 of the Federal Judicial Code on the question of exclusive jurisdiction vested in the Federal Courts over all crimes and offenses cognizable under the authority of the United States.

In fact, in paragraph 5 of the opinion of Chief Justice Taft, page 143 of said report says:

> "(5) If Congress sees fit to bar prosecution by the Federal Courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. * * * But it is not for us to discuss the wisdom of legislation; it is enough for us to hold that in the *absence of special provision by Congress*, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the Federal law for the same acts."

It is clear that the Chief Justice either overlooked Section 256 of the Federal Judicial Code, recognized as the Supreme Law of the Land, or ignored its application entirely, because we do not see how Congress could place any broader or more positive declaration as to exclusive jurisdiction in the Federal Courts, which, necessarily in the force of its effect would prohibit dual prosecution, if the Federal Government is vested with exclusive jurisdiction over the subject matter. Therefore, it would appear that Congress has acted, otherwise the force of Section 256 of the Federal Judicial Code must give way to State prohibition legislation and not be applied generally. In other words, notwithstanding the positive declaration that exclusive jurisdiction is vested in the Federal Courts in the matter of prohibition it may not be applied.

The Federal Judicial Code is an expression of Congress as to what offenses or crimes shall be embraced in the exclusive jurisdiction of the Federal Court and has as much force as the national prohibition legislation enacted by Congress in support of the Eighteenth Amendment to the Federal Constitution.

The distinction between the *Lanza* case and instant case is that the State had acted first, whereas in the case at bar the Federal Government was first seized of jurisdiction, having exclusive jurisdiction over the subject matter under Section 256 of the Federal Judicial Code.

It will be argued by defendant in error that the 18th Amendment controls and that Section II of said amendment vests the several States with concurrent power to enforce the same. The word concurrent has lost its meaning under the interpretation placed upon this phrase by the Courts and no longer means equal power. Heretofore all sentences imposed by Courts that run concurrently have been construed to mean operating equally or together.

Concurrent jurisdiction is that jurisdiction exercised by different Courts at the same time over the same subject matter and within the same territory and wherein litigants may, in the first instance, resort to either Court, indifferently.

Bouviere Law Dictionary, "Jurisdiction."

It is positive that the 18th Amendment is not self operative and legislation must be enacted to carry it

into effect. This legisation is represented by the Volstead and National Prohibition Acts. Section 256 of the Federal Judicial Code was in force when the 18th Amendment was adopted and prohibition laws enacted. It was re-enacted in February, 1923, and in 1925, since the adoption of the 18th Amendment and the passage of the Volstead National Prohibition Laws.

If its application is restricted in so far as prohibition is concerned it would likewise not be of force and effect as to other subject matters over which the Federal Government exercises exclusive jurisdiction. The violation of prohibition laws is undoubtedly an offense cognizable under the authority of the United States. If Section 256 of the Federal Judicial Code has no application as a bar to prosecution by the State Courts, then its mandatory provisions amount to nothing more than a mere scrap of paper.

This has been avoided by numerous decisions on the ground of exercising the police power by the states and on the theory that a state is an independent sovereignty. This is inconsistent with the principle of our government, since no state in the exercise of its independent sovereignty can enact legislation to repeal prohibition laws of Congress. Then what becomes of its freedom and sovereignty as an independent political subdivision of the United States of America?

The modern decisions on this subject matter have likewise destroyed every vestige of the comity formerly existing between courts.

On the question of comity between Courts we cite *16 Corpus Juris, page 161, Criminal Law, Section 185:*

> "The rule of comity between the Federal and State Courts is the same in criminal as in civil cases; and, where each can take jurisdiction, the one which first gets it, holds it to the exclusion of the other."

16 Corpus Juris, page 148, Criminal Law, Section 166, Paragraph 5:

> "Court First Acquiring Jurisdiction. Several Courts may have concurrent jurisdiction of an offense. In such case, the Court first obtaining jurisdiction of the accused retains it to the exclusion of the other, and a criminal prosecution instituted in the other Court should be dismissed."
>
> *U. S. v. Wells, 28 Fed., Case No. 16,665.*
>
> Also, *Correl v. Heyman, 111 U. S., pages 176-182.*

THE ILLEGAL AND UNWARRANTED SENTENCES UNDER ACT NO. 39, LOUISIANA LEGISLATURE EXTRA SESSION 1921.

We believe we have already shown that the final decision of the Honorable Supreme Court of Louisiana is repugnant to, and in conflict with the Constitution and laws of the United States, as also to the constitutional privileges and immunities of the State of Louisiana, and that the necessary principles, demonstrating lack of due process of law as applied to the plaintiff in

error with reference to the sentence imposed, are pronounced.

We cite the following authorities:

> "Where there are two provisions in an act, the one special and the other general, apparently conflicting, the special must be taken as intended to be an exception to the general. The Legislature cannot be supposed to have intended a conflict—(1901) Rodgers v. United States, 36 Ct. Cl., 266, judgment affirmed (1902) 22 S. Ct., 582, 185 U. S., 83, 46 L. Ed., 816."

To sustain the sentence imposed the Honorable Supreme Court of Louisiana, notwithstanding the statute is a special statute, and seeks to prohibit the manufacture, sale, possession, etc., of intoxicating liquors, invoked the aid of a general statute, Section 980 of the Revised Statutes of Louisiana of 1870, and hold that it should govern the special statute. This, we contend, is absolutely unwarranted and that said special statute must stand alone in so far as the subject matter involved is considered, positively repeals the provisions of the general law, if said general law has any application whatever. In fact, the Honorable Supreme Court of Louisiana seeks to control a special statute by a general statute, which amounts to judicial legislation and clearly deprives the plaintiff in error of his liberty and property without due process of law.

> "When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over

other sections in which only incidental reference is made thereto. Judgment, *Ex parte* Jackson (C. C. 1905), 140 F., 266, reversed. United States v. Jackson, 143 F., 783, 75 C. C. A., 41; Same v. McKerracher, *Id.*

"When statutes contain two distinct provisions, one being specific with precise directions to do a particular thing for a specific purpose, and the other general, prohibiting certain acts which in their general sense include the particular thing authorized by the specific direction and the general prohibition clause does not control the specific authority. The particular direction is construed in the nature of an exception. Atchison, T. & S. F. R. Co. v. Haynes, 58 P., 738, 8 Okl., 576.

"A general provision of a statute must yield to a special one so far as is necessary to give effect to the particular subject of the special provision. (1905) City of Austin v. Cahill, 88 S. W., 542; (Civ. App. 1905), Callaghan v. McGown, 90 S. W., 319."

In the case of *United States v. Staff of (Missouri), 268 Fed., p. 417*, it was held:

"When a subsequent statute imposes a penalty for the same offense as that for which a prior statute imposed a different penalty, there is an inconsistency between the statutes, to which the rule of repeal by implication applies, especially where the punishment imposed by the latter statute is less than that imposed by the earlier."

The United States Circuit Court of Appeals (Tenn.) in *Reynolds v. United States, 280 Fed., p. 1,* and *235 U. S., 133,* on this subject, interpreting a similar provision in the National Prohibition Act, says:

> "Under National Prohibition Act, Title 2, Sec. 29, authorizing punishment by fine or imprisonment *on a first conviction* for manufacturing liquor, both fine and punishment are not permissible."

Under due process of law "the punishment inflicted must be authorized by law." *Anderson v. State, 126 Pac., 840, 847, 8 Okl. Cr., 90; State v. Bates, 47 Pac., 78, 79, 14 Utah, 293, 43 L. R. A., 33.*

As stated in *Walker v. Sauvinet, 92 U. S., 90, 23 L. Ed., 678,* "it is process due according to the law of the land."

> "That the Constitution is the 'law of the land,' in the sense that no act of either department of the government, which violates its provisions or exceeds its powers, can be enforced to deprive the citizen of his life, liberty, or property, is a fundamental truth. To deny it is to assert that constitutional government is a failure, and liberty, regulated by law, has no abiding place in our political system. The Constitution is, of necessity, as well as the declared will of the people, the supreme law, and in no proper legal sense can any act of either department of the government which violates its provisions or exceeds the powers delegated, be by law. State

v. Williams, 61 S. E., 61, 62, 146 N. C., 618, 17 C. R. A. (N. S.), 299, 14 Ann. Cas., 562."

If Act No. 39 of the Louisiana Legislature, extra session, for the year 1921, under which plaintiff in error was prosecuted is a special statute covering the subject matter, providing for prosecution and punishment thereunder, and limits the penalty "for a first offense" to a fine not exceeding five hundred dollars ($500.00) and imprisonment not exceeding sixty (60) days, then the Honorable Supreme Court of Louisiana, in its decision maintaining the conviction, under the alternative sentence of six months additional imprisonment in default of the payment of fine, certainly cannot invoke the general statute to enforce the alternative sentence, because it is not the law of the land, and must necessarily deprive the plaintiff in error of his liberty and property without due process of law. When the Courts go aside from the special statute and invoke a general statute enacted in 1870, long before the XVIII Amendment or prohibition legislation of this character was ever dreamed of, and utterly disregard the specific terms and provisions of the special statute in imposing an illegal sentence, not under the special statute, but under the general statute, then plaintiff in error is certainly deprived of his liberty and property without due process of law, merely by judicial legislation. Is the Court permitted to disregard the legislative will under the special statute and substitute therefor the provisions of the general statute?

"As a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial

Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed."

Panama Railroad Co. v. Johnson, 264 U. S., 375, 384, 44 S. Ct., 391, 68 L. Ed., 751.

"Where a State law is assailed as repugnant to the Constitution, and on its face such act is seemingly within the power of the State to adopt, but its *necessary effect and operation is to usurp a power granted by the Constitution to the United States*, it must follow from the paramount nature of the Constitution, that the act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed on the States by the Constitution.

"A crime is 'cognizable under the authority of the United States' when it is triable in its Courts by virtue of its laws."

United States v. Lewis, Fed. Rep., Vol. 36, p. 449.

The supremacy of acts of Congress over State laws must prevail.

"No State Government can exclude it from the exercise of any authority conferred upon it by the Constitution or Congress * * *

or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. The United States is a government extending over the whole territory of the Union, acting upon the States and upon the people of the States."

Tennessee v. Davis, 100 U. S., 263.
White v. Hart, 13 Wall., 650.
Tarble's Case, 13 Wall., 406.
Waite v. Dowley, 94 U. S., 532.

"Sec. 256. Cases in which jurisdiction of United States Courts shall be exclusive of State Courts. The jurisdiction vested in the Courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the Courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States." * * *

Cooley on Constitutional Limitations, Section 5, 12 C. J., page 679:

"To hold a man responsible to two sovereigns for the same offense is strictly contrary to our constitutional provisions."

Story, Constitution, United States, Section 338, reads:

"The true view to be taken of our State Constitutions is that they are forms of gov-

> ernment, ordained and established by the people in their original sovereign capacity to promote their own happiness, and permanently to secure their rights, property, independence and common welfare."

We have not had an opportunity to discuss in detail the application of conflict of laws and constitutional limitations.

> "Sovereignty of a State embraces the power to execute its laws and the right to exercise supreme dominion and authority except as limited by the fundamental law. People Ex Rel. Attorney General v. Tool, 86 Pac., 224-226; 35 Colo., 225, 6 L. R. A. (N. S.), 822, 117 Am. St. Rep., 198."

Our Constitution prohibits dual prosecution for the same offense, and the State is limited by our fundamental law just as the Federal Government is limited by the Federal Constitution to the same extent.

Words and Phrases, Vol. 7 (1st Ed.), pages 6561-6563, "Sovereign Power" and "Sovereignty," universally lays down the rule and definition by both Federal and State Courts that, in the first instance, "Sovereign Power" means absolute power, unrestricted, and "Sovereignty" means the right to govern independent of any other power. There are numerous decisions cited, all of which support our contention that the State of Louisiana is no longer an independent sovereign under the letter and spirit of the XVIII Amendment.

On the question of the right of the State Court to snatch this defendant from the Federal Court, which first was seized of jurisdiction, for the purpose of trial for the same offense, the case of *Ponzi v. Fessenden, 42 U. S. Supreme Court Rep., p. 310 (258 U. S., 254)*, Chief Justice Taft held that it could not be done, using the following language in his opinion, to-wit:

> "The chief rule which preserves our two systems of Courts from actual conflict of jurisdiction is that the Court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other Court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell v. Heyman, 111 U. S., 176, 4 Sup. Ct., 355, 28 L. Ed., 390, as follows:
>
> " 'The forbearance which Courts of co-ordinate jurisdiction administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; *but between State Courts and those of the United States it is something more. It is a principle of right of the law, and therefore, of necessity.* It leaves nothing to discretion or mere convenience. These Courts do not belong to the same system, so far as their jurisdiction is concurrent; and although

they coexist in the same space they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.'

"Conflict of laws—State and Federal—which supreme.

"Notwithstanding State and Federal power over intoxicating liquors is concurrent, in case of repugnancy between the statutes of the respective jurisdiction, constitutional acts of Congress will be held supreme. (See notes in 10 A. L. R., 1587; 11 A. L. R., 1320.)

"In case of irreconcilable conflict between State and Federal statutes for the enforcement of the 18th Amendment to the Constitution, State Courts must, in the absence of final decision by the Supreme Court of the United States, treat the Federal statute as supreme. (See notes in 10 A. L. R., 1587; 11 A. L. R., 1320.)"

We have found no decision where our United States Supreme Court has held that Section 256 of the Federal Judicial Code will not apply to the case at bar. There is repugnancy between this act of Congress and the act of the State of Louisiana in seeking to usurp jurisdiction over an offense or crime cognizable under the authority of the United States.

In view of the fact that the dissenting opinion of Chief Justice O'Niell of the Honorable Supreme Court of the State of Louisiana sets out so clearly and distinctly the grievous errors of the whole Court, and because it was inadvertently omitted from the printed record, we quote the same *verbatim* and adopt it as part of our argument to sustain our position. The same reads as follows, to-wit:

> O'NIELL, C. J. (dissenting). Writing a dissenting opinion cannot change the result in this case because the Court did not reserve to the defendant the right to apply for a rehearing, when the case was decided against him, on the rehearing that was granted to the State. But the Court's ruling in the case, with regard to Section 980 of the Revised Statutes, seems to me so very wrong that I am impelled to do what I can to see it corrected some day.
>
> In the first opinion handed down in this case, I failed to cite the decision in State v. Ryder, 36 La. An., 294; and it was also overlooked by the Court and council while the case was pending on rehearing. I believe that the Court would have followed the ruling in that case if we had been reminded of it before the ruling in this case became final. Ryder was convicted of the crime of inflicting a wound less than mayhem, and was sentenced to pay a fine of $500 and to be imprisoned for the term of 2 years, "and in default of said fine at the expiration of said sentence, to suffer additional imprisonment

at hard labor in the State penitentiary for one year, and to pay all costs." This Court held that the sentence of imprisonment was illegal in so far as the term exceeded the maximum term allowed by the statute denouncing the crime of inflicting a wound less than mayhem. The Court said:

"The legality of the sentence quoted above is denied.

"Section 794, R. S., provides:

" 'Whoever shall, with a dangerous weapon or with intent to kill, inflict a wound less than mayhem upon another person, shall, on conviction, be imprisoned not exceeding two years nor less than six months, with or without hard labor, and be fined not exceeding one thousand dollars.'

"Section 980, R. S., provides that:

" 'Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year.'

"The first section limits the term of imprisonment within two years and leaves it discretionary with the Judge to make it with or without hard labor.

"Of course, if this section stood alone, the sentence in question would be excessive and unwarranted.

"Is there anything in the last section (meaning 980 R. S.) that authorizes the Judge

to inflict a punishment, for this offense and for nonpayment of the fine, of more than two years' imprisonment at hard labor? Unless the last provision furnishes a clear warrant for such punishment, beyond two years—the extreme limit declared in the first section mentioned—it cannot prevail against the positive declaration of the first. Criminal statutes, especially those providing or declaring the penalties of the law, must be strictly construed."

In the opinion handed down by Justice Dawkins, in this case, it is said that the Court has adopted the dissenting opinion that was handed down by Justice Land, and that the Court desired also "to point out the differentiating features of the cases cited by the Chief Justice in support of the conclusion reached in the opinion delivered by Division A." Justice Dawkins quotes the penal clause of the ordinance that was violated in one of the three cases which I referred to (which were all alike), to show that the ordinance itself put a limit upon the fine and the term of imprisonment that could be imposed for a violation of it. In that respect, there was no difference between the ordinance and the Hood Act, except that the language of the ordinance was redundant. It declared—as quoted by Justice Dawkins—that the penalty was a fine not exceeding $25 or imprisonment for a term not exceeding 30 days, or

both the fine and imprisonment, and then it repeated:

"Or imprisonment in said parish prison for a term not to exceed thirty (30) days in default of the payment of said fine; provided that the fine shall not exceed twenty-five ($25) dollars for each offense, nor the imprisonment more than thirty (30) days."

The writer of the ordinance, manifestly, having made it complete, was yet determined to work in exactly the language of the statute (Act 41 of 1890, p. 33, limiting the city's power of enforcing ordinances), which was itself somewhat redundant, viz:

"By fine or imprisonment, or both, or by imprisonment in default of the payment of the fine; provided, that the fine shall not exceed twenty-five dollars for each offense, nor the imprisonment (be) more than thirty days, as provided by Section 12 of Act 131 of 1877."

The expression "or by imprisonment in default of the payment of the fine," after the statement "by fine or imprisonment, or both," is sheer tautology. It means simply that the penalty shall be a fine not exceeding $25 or imprisonment for a term not exceeding 30 days, or both the fine and imprisonment, within those limits, in the discretion of the Judge. The language cannot have any other meaning.

In this case, also, the statute (Section 3 of Act 39 of 1921, as quoted in my original

opinion and in Justice Land's dissenting opinion) limits the term of imprisonment that may be imposed in default of the payment of the fine.

The statute is very plain in this respect—and we all agree upon it—that, for violating the statute, otherwise than by selling intoxicating liquor, or manufacturing or having it for sale, the guilty party shall be fined not more than $500, or be imprisoned for a term not less than 10 nor more than 30 days, "or may be both fined and imprisoned," within those limits, "at the discretion of the Court."

I adhere to our original ruling, that Section 980 of the Revised Statutes, declaring that every person condemned to pay a fine, shall, in default of payment or recovery of the fine, be sentenced to imprisonment for a term not exceeding a year, does not apply to a case where the statute that is violated fixes or limits the term of imprisonment which may be imposed as a penalty for that particular offense. Section 980 is applicable to those cases only where the statute itself, or ordinance, imposing a fine, does not provide for imprisonment, or limit the term of imprisonment, to be suffered in default of the payment of the fine. We had such a statute before us in State v. George Kilshaw (No. 26968) 103 So. 740 (not yet [officially] reported), where the Act 12 of 1870 (Section

2), without providing for any term of imprisonment for the first offense, declared:

"Whoever shall keep a banking game * * * shall, on conviction for the first offense, be fined not less than one thousand nor more than five thousand dollars," etc.

In a case like that, of course, the guilty party might be imprisoned for a term not exceeding a year, under Section 980 of the Revised Statutes, as a means of coercing the payment of the fine. But when, as in this case, the statute declares that the penalty for a violation of it shall be a fine not more than $500 or imprisonment for a term not less than 10 nor more than 60 days, or both the fine and imprisonment within those limits, the Court cannot impose the limit of both the fine and imprisonment and then add another year of imprisonment to be suffered in default of the payment of the fine.

In the dissenting opinion of Justice Land, which the Court has adopted on rehearing, it is said:

"It is true that the Legislature could have provided in the Hood Act that, in default of the payment of the fine, the convicted person should be imprisoned in the parish jail not more than sixty days. But the Legislature has failed to do so."

I suppose that the learned Justice sees a distinction—though I do not see any differ-

ence or distinction—between saying that the penalty shall be a fine not exceeding $500 or imprisonment for a term not exceeding 60 days, and saying that the penalty shall be a fine not exceeding $500 or, in default thereof, imprisonment for a term not exceeding 60 days. The expression "in default of the payment of the fine," or "in the alternative," does not add to or change the meaning of a statute that declares that the penalty for violating it shall be a fine not exceeding so many dollars or imprisonment for a term not exceeding so many months, or both the fine and imprisonment within those limits, at the discretion of the Court. If Justice Land and the Justices who have adopted his opinion agreed with me in that respect, the original opinion that was rendered in this case would have remained the opinion of the Court; for it is in that respect only that Justice Land, in his dissenting opinion, did not agree with the members of Division A of the Court. In order to emphasize that that is the only difference of opinion in this case, I shall quote from the dissenting opinion, which has been adopted as the majority opinion of the Court, several excerpts which leave no doubt about its import.

On the second page of the opinion (103 So. 747) it is said, of Section 980 of the Revised Statutes, "Its sole object being to supply an alternative sentence when omitted from any criminal statute."

My answer to that is that the statute in this case does provide an alternative sentence of fine not exceeding $500 or imprisonment for a term not less than 10 nor more than 60 days.

On the fourth page of the opinion (103 So. 748) the question is asked:

"Can it be seriously contended that the Legislature, after providing for punishment, both by fine *and* imprisonment, should have intended to relieve the person convicted under the Hood Act of that part of the punishment covered by the fine?"

A convicted person is not *relieved* who gets the full limit of penalty—both fine and imprisonment. The idea seems to be that, when a Judge, instead of imposing a fine or imprisonment, in the alternative, imposes both the fine and imprisonment to the full limit allowed by the statute, he ought to be allowed to impose additional punishment, in the way of imprisonment for a term not exceeding a year, in default of payment of the fine, or as a penalty for nonpayment of the fine. I do not subscribe to that.

On the same page of the opinion, it is said:

"It is inconceivable to my mind that the Legislature should permit a fine as high as $500 to be imposed under the Hood Act, and,

in addition to this fine, should provide imprisonment only for the light maximum limit of 60 days, and should have then intended to include in that petty term of incarceration *the full* punishment, both for the imprisonment actually inflicted, and also for the default in the payment of a fine, which is so large as to be out of all proportion to a jail sentence so insignificant as a penalty, even if inflicted as a punishment for the crime alone."

I would not consider 60 days in prison a "petty term of incarceration." I do not regard a fine of $500 as being "so large as to be out of all proportion to a jail sentence so insignificant as a penalty." I dare say 99 out of every 100 American citizens would rather pay a fine many times $500, if they had it, than to suffer the misery and disgrace of imprisonment in a jail for 60 days, subject to work on the public streets and roads. I doubt that any man in Louisiana who could possibly put up a fine of $500 has ever, as a matter of preference, suffered imprisonment in jail for 60 days.

On the fifth page of the opinion (103 So. 748) it is said:

"When an act makes no express provision for imprisonment in default of payment of a fine, such act cannot be said to be in conflict

with Section 980 of the Revised Statutes, nor can it be logically contended that such section does not apply, as said section applies only in case of the failure of an act to contain a provision for an alternative punishment, when a fine is not paid."

When a statute declares that the penalty for a violation of it shall be a fine of so many dollars or imprisonment for so many days or both the fine and imprisonment within the limits stated, at the discretion of the Court, that in itself makes an "express provision for imprisonment in default of payment of the fine." I have never seen nor heard of a statute making any further provision for imprisonment in default of payment of the fine.

Of the four decisions cited in the dissenting opinion of Justice Land, I find only two of them pertinent to the question in this case; and, even in those two cases, the question that is now presented was not up for decision. State v. Brannon, 34 La. An., 942, holds merely that Section 980 of the Revised Statutes cannot be invoked to coerce the payment of the costs in a criminal case, when no fine is imposed. State v. Joseph, 137 La., 52, 68 So., 211, is authority for the proposition only that a fine is not a debt. In State v. Abraham, 139 La., 466, 71 So., 769, the only matter before the Court was a motion to dismiss the appeal, for want of jurisdiction. And the motion was overruled. The sentence imposed, for selling intoxicating liquor without

a license, was $305 and costs, "and, in default of paying said fine," imprisonment for two months. The penalty allowed by the statute was a fine not less than $100 nor more than $500, and, in default of payment of the fine and costs, imprisonment within the discretion of the Court, or both fine and imprisonment, at the discretion of the Court. The Court took occasion to say that the sentence that was imposed was within the penalties prescribed by the statute that was violated, without regard to Section 980 of the Revised Statutes. The excerpt which Justice Land has taken from the opinion, with regard to the scriptural tinkling cymbal and sounding brass, is not pertinent to the question on which we disagree in this case. The fourth and last decision cited in Justice Land's dissenting opinion, State v. McGuire, 152 La., 953, 94 So., 896, was written by him. I did not take part in the decision, for the reason that I was then in Rio de Janeiro, representing the State at the Centennial Celebration. McGuire was prosecuted for a second offense of having intoxicating liquor in his possession for beverage purposes, and, on conviction, was sentenced to pay a fine of $1,000 and be imprisoned for 4 months, and to work on the public works, and, in default of payment of the fine, to serve an additional term of 12 months in prison. He did not urge the point, or make the complaint, that the statute itself limited the penalty, for the second offense, to the fine of $1,000 and the imprisonment

for 4 months, and that Section 980 of the Revised Statutes was therefore not applicable. The complaint was—as copied in the published opinion—that the fine of $1,000 and imprisonment for 4 months was "excessive and violative of the Constitution"; and that "the alternative of 16 months' imprisonment and to work on the public roads or works of the parish" was " 'cruel and unusual punishment' and forbidden by the State and Federal Constitution." What was said by Justice Land in that case, with regard to Section 980 of the Revised Statutes, was not decisive of the question now before the Court, because the question was not then at issue.

There is nothing peculiar in the provisions of the Hood Act that makes Section 980 of the Revised Statutes not applicable to this case, any more than there is in any other statute that limits the term of imprisonment that may be imposed as a penalty for a violation of it.

I adhere to the original opinion handed down in this case.

RODGERS, J., concurs.

State v. Hebert, 158 La. Rep., pp. 229, et seq. (103 So. Rep., 742).

Thus it will be seen that the sentence imposed upon plaintiff in error is excessive, illegal and not warranted under the special statute governing the

legislative will on the subject matter involved. There is no other law than this special statute under which he could be sentenced. The action of the tribunals of the State of Louisiana in maintaining the sentences imposed is clearly not authorized by the law, and we consider that this Honorable Court is the only tribunal empowered to grant the plaintiff in error the relief prayed for. He has been sentenced to an excessive and unusual sentence without warrant of law and is thus deprived of his liberty and property without due process of law.

In conclusion, we will state that there are two main propositions before this Honorable Court:

First: Does Section 256 of the Federal Judicial Code vest exclusive jurisdiction in the Federal Courts over the offense charged?

Second: Does a sentence imposed upon one without warrant of law constitute due process of law?

In the first instance the whole case would be annulled. In the second instance the penalty authorized by the special statute would be annulled and set aside and the original decree sustained and reinstated.

We have endeavored to present to this Honorable Court the questions in this case as concisely and minutely as our ability and circumstances will permit and regret that we could not handle the subject matter with greater brevity.

We earnestly urge that the relief prayed for by the plaintiff in error be granted, decreeing the nullity of the judgment rendered; and, in the alternative, that the sentence imposed beyond the penalty fixed in the special statute be annulled and set aside.

Respectfully submitted,

A. R. MITCHELL,
Attorney for Plaintiff in Error;

THOS. ARTHUR EDWARDS,
Of Counsel.

Lake Charles, Louisiana,
September 15, 1926.

Certificate of Service.

The undersigned counsel for Plaintiffs in Error hereby certify that they have served a copy of this brief on Hon. Percy Saint, Attorney General of Louisiana, at New Orleans, La., and on Hon. John J. Robira, District Attorney, at Lake Charles, La., by depositing the same in the U. S. mails, postage fully prepaid, at New Orleans, this 16th day of September, 1926.

A. R. MITCHELL.

THOS. ARTHUR EDWARDS.

SUPREME COURT OF THE UNITED STATES.

No. 24—October Term, 1926.

Doras Hebert, et al., Plaintifis in Error, vs. State of Louisiana	In Error to the Supreme Court of the State of Louisiana

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

With leave of this Honorable court, comes plaintiffs in error Doras Hebert, et al, in the above entitled and numbered cause, through undersigned counsel, and respectfully show to the court that they are aggrieved because of the decision rendered in said cause by this Honorable Court, through Mr. Justice Van Devanter, on November 1, 1926, and now respectfully moves this court to grant a rehearing of said cause on the ground and for the reasons following, towit:

ASSIGNMENT OF ERROR NO. 1.

This honorable court erred in affirming the judgment of the Supreme Court of Louisiana, because said court did not have jurisdiction of the person of the accused, because they were in the custody of the Federal Court under bond to answer for the same offense, which court was first seized of jurisdiction

and had not waived or exhausted its jurisdiction, and for the reason under the charge lodged against the accused in the Federal Court they were entitled to a trial by jury and denied the right of a trial by a jury under the State Law; and, further, because said State Court had no jurisdiction of the subject matter or offense with which they were charged, because of the provisions of Section 256 of the Federal Judicial Code, purporting to vest exclusive jurisdiction in the Federal Court over the offense charged.

ASSIGNMENT OF ERROR NO. 2.

This Honorable Court further erred in its opinion on page 3, holding that if the United States did not intercede the accused could not be heard to complain, because if the Federal Government did have a right to intercede to maintain its jurisdiction the accused would have the same right unless the United States abandoned the prosecution and voluntarily surrendered the plaintiffs in error for trial to the State Courts; and this Honorable Court erred in assuming that the Federal Court did acquiesce and surrender its jurisdiction (as a matter of fact it did not,) and as long as the accused did timely complain, a denial of such right would be denying them the uniform and equal protection of the law under the Constitutional provisions relating thereto, or, in other words, if the United States had a right to intercede then the same right is vested in the individual citizen.

ASSIGNMENT OF ERROR NO. 3.

The court further erred in holding that Section 256 of the Federal Judicial Code could apply only to offenses against the Federal Government and cognizable under the authority of the United States, because the same is an act of Congress preserving to the Federal Courts the **exclusive jurisdiction** over such offenses as are recognized as a crime or an offense against the United States, and is a specific selection of such offenses over which the Federal Government shall have **exclusive jurisdiction** and the jurisdiction of the several states shall be excluded, and if it applied only as interpreted it would be idle and useless, because the United States would need no such special provision as the supreme law of the land unless it was the intention to declare that where any conflict of authority arose between the Federal Government and any State the United States should have **exclusive jurisdiction** over the subject matter involved if cognizable under its authority.

ASSIGNMENT OF ERROR NO. 4.

The Honorable Supreme Court of the United States further erred in so holding because the Federal Law is the Supreme Law of the Land, so designated under the Constitution and Laws of the United States, because Congress has the power to enact laws restricting the several states in their legislation on certain subject matters cognizable under the authority of the United States, and to prohibit dual prose-

cution for the same offense, otherwise under certain cases a man could be hung twice for the same offense, and said decree therefore nullifies the provisions of the Constitution as urged by plaintiffs in error and particularly so under the XVIII Ammendment since Section 2 thereof provides that Congress and the several States shall have concurrent **power** to enforce said ammendment and does not provide that the two independent sovereignities shall have "separate" **power** so to do; and because said decree destroys the comity existing between courts well established and existing from time immemorial, and likewise overrides the common custom of the Republic, because heretofore the paying of a penalty in one court of competent jurisdiction has generally been recognized and the contrary principle has only become pronounced in the enforcement of prohibition since the XVIII Ammendment and made applicable principally to violations of liquor laws only.

ASSIGNMENT OF ERROR NO. 5.

This Honorable Court further erred in holding that the State and Federal Governments are two separate and independent sovereignities under the XVIII Ammendment, because said ammendment is not self-operative and since the Federal Government enacted legislation carrying said ammendment into effect the State legislature can not enact legislation on the liquor subject in the exercise of its independent dominion, unless such legislation is in aid of prohibition and restricts its independence to such limit, thus denying unto the several states the right

of self-government and the power to act on or legislate on the subject independently and as a free agent.

ASSIGNMENT OF ERROR NO. 6.

This Honorable Court further erred in decreeing that no Constitutional rights, privileges or immunities of plaintiffs in error have been violated, because such a decision is in conflict with Constitutional provisions under both the Federal and the State Constitutions relating to double jeopardy and dual prosecution for the same offense and can only have the effect of causing the repeal of the State Laws in aid of prohibition and the enforcement of the XVIII Ammendment, since any other legal remedy is denied.

ASSIGNMENT OF ERROR NO. 7.

This Honorable Court further erred in its ruling holding that plaintiffs in error were not deprived of their liberty and property without due process of law, because a trial by jury was guaranteed accused in the Federal Court and was denied the accused in the State Court, and an excessive and illegal sentence imposed beyond the power of the court to impose, and because the accused were denied the right to contest the validity of the search warrant used by Federal Agents in searching the private dwellings of the accused.

ASSIGNMENT OF ERROR NO. 8.

This Honorable Court further erred in its ruling on page 4 of said decree in holding that the plaintiffs in error had not urged the lack of power on the

part of the State to impose the excessive and illegal sentences complained of, because it was the intention of the plaintiffs in error to urge the want of power on the part of the State of Louisiana to impose a sentence beyond the terms and provisions of the special statute, and urged the want of due process of law and lack of power before this Honorable Court, and if the principle announced in the decree is sustained a State court could imprison a citizen of the United States without any warrant of law whatsoever and such citizen would be denied any remedy or relief, except perhaps by writ of Habeas corpus after serving the portion of the sentence that might be imposed in accordance with the statute, if not held res adjudicata.

ASSIGNMENT OF ERROR NO. 9.

The decree of this Honorable Court is further erroneous in that said decree is conflicting in its scope because the XVIII Ammendment is held not the source of power for the enactment of legislation by the several states against sale and manufacture of intoxicating liquors, yet at the same time holding that the State is an independent sovereignity and does not derive right or power from the XVIII Ammendment, but implies that the XVIII Ammendment may be ignored insofar as legislation on the part of the several states is concerned, yet restricting them and their independent sovereignity merely to legislation in favor of prohibition and denying their right to enact legislation against prohibition or authorizing the manufacture of intoxicating

liquors, and therefore said opinion is conflicting and inconsistent with the principle of self-government, because in one instance it restricts the independence of the State and in the other it treats the State as an independent government with the right to enact legislation irrespective of the Constitution of the United States, on the subject of prohibition, which amounts to **class legislation** through judicial interpretation.

WHEREFORE, plaintiffs in error respectfully pray that this motion for rehearing be allowed and filed; that said cause be reconsidered by this Honorable Court and a rehearing granted, setting aside the decree rendered herein on November 1st, 1926, and annulling the decree of the Honorable Supreme Court of the State of Louisiana, granting unto plaintiffs in error the relief originally prayed for and ordering that they be discharged without day and their bonds cancelled.

For all orders and decrees necessary in the premises, full, general and equitable relief, and such special relief as they may be entitled to under the Constitution and Laws of the United States of America.

Respectfully submitted:

Lake Charles, Louisiana,
December 3, 1926.

A. P. Mikell
Attorney for Plaintiffs In Error.

Alex Britton Edwards
Of Counsel.

Office Supreme Court, U. S.
FILED
OCT 1 1926
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 24.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ABADIE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

PERCY SAINT,
Attorney General.
PERCY T. OGDEN,
Assistant Attorney General.

JOHN J. ROBIRA,
E. R. SCHOWALTER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 24.

DORAS HEBERT, ALCEE BENOIT, JOHN MILLER, AND CLOBULE ABADIE, PLAINTIFFS IN ERROR,

vs.

THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

Plaintiffs in error rely upon the following assigned errors:

Point 1. That the Honorable Supreme Court of Louisiana erred in refusing to maintain the plea to the jurisdiction of the State District Court, for the reason that defendants had been indicted and placed under bond in the United States District Court for the West-

ern District of Louisiana, charged with a violation of the Eighteenth Amendment to the Constitution of the United States, and the National Prohibition act, for offenses growing out of identical acts, for which they were prosecuted in the State District Court under Act 39 of the Legislature of Louisiana for the year 1921. Plaintiffs in error take the novel and seemingly ingenious position that under Section 256 of the Federal Judicial Code the State courts are powerless to prosecute violations of its laws or offenses against its sovereignty as defined by State statutes.

Point 2. That the Honorable Supreme Court of Louisiana further erred in holding that the sentence imposed was legal and valid under Act 39 of the Louisiana Legislature of the year 1921, and particularly Section 3 of said act, reading:

> "That any person who shall violate the provisions of this act by manufacturing, or having in possession for sale, or by selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense, shall be fined not more than five hundred dollars, and be imprisoned not less than ten days nor more than sixty days,"

because the statute limits both the fine and imprisonment "for the first offense," and for the reason that the remainder of said Section 3 of Act 39 of the Louisiana Legislature of 1921 reads:

> "And for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars

> ($1,000.00), and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this act shall, upon conviction, be fined as herein above provided, or, may be imprisoned not exceeding the maximum limits herein above provided, or may be both fined and imprisoned, at the discretion of the court,''

because the first portion of said statute quoted actually, in plain language, limits the powers of the trial court as to the sentence to be imposed for the first offense, which enables the court to impose a maximum fine of not more than $500 and a jail sentence of not less than ten days nor more than sixty days, which positively fixed both a minimum and maximum sentence, with the discretion of the trial court to impose the limit provided, and does not authorize any other sentence for the first offense, and specially provides a latitude to the trial court to impose an alternative sentence in the parish jail for not less than ten days nor more than sixty days in default of the payment of any fine imposed not exceeding $500; and this statute specially repeals Section 980 of the Revised Statutes of Louisiana on this subject-matter, and any resort to said statute in an attempt to impose a fine exceeding $500 or in default of payment, by imprisonment beyond sixty days, is a violation of the Federal and State constitutional rights and privileges of defendants, and particularly under the provisions of said constitutions above quoted, in that said decree of April 11, 1924, deprives the defendants of the equal protection of the

laws and of their property and liberty without due process of law; therefore relators have been illegally convicted. And because the subsequent part of said Section 3 of Act 39 of Louisiana Legislature last quoted specially provides an increased penalty over that provided in the first part quoted "for a second or subsequent offense," providing fine of not less than $100, nor more than twelve months, and makes a special provision for any other violations of this law for first and second offenses.

Point 3. That the Honorable Supreme Court of Louisiana further erred in its decree in this matter in holding that the Revised Statutes of Louisiana, Section 980, reading:

> "Every person being adjudged to pay a fine, shall, in default of payment or recovery thereof, be sentenced to be imprisoned for a period not exceeding one year,"

should govern and control in sentencing a defendant because such decree is judicial legislation and an encroachment by the judiciary upon the legislative branch of the State government, in violation of article 11, and subsections 1 and 11 of the Louisiana Constitution for the year 1921, for the reason that said decree reads into said special statute, Act No. 39 of 1921, Section 980 of the Revised Statutes, and fails to uphold the plain provisions and legislative will set out in said Act 39 of 1921, because if said Act 39 of 1921 is not specific and definite in its terms, then said whole stat-

ute is unconstitutional, null and void for failure to provide for the imposition of any penalty whatever for its violations, and in such a case, this Honorable Court cannot, by judicial interpretation, bring to its aid, in order to maintain its effectiveness, Revised Statutes of Louisiana, Section 980, because each section and provision of said Act 39 of Louisiana Legislature for the year 1921 is so interwoven that any part thereof which proves ineffective necessarily strikes the whole statute with nullity, and therefore said decree imposes an illegal, null and void sentence upon your defendants, and deprives them of their liberty and property without due process of law.

Plaintiffs in error have assigned a fourth point, which, however, has not been pressed in their brief, and, therefore, under uniformly accepted rules of practice, must be taken as abandoned.

Reply of the State of Louisiana, Defendant in Error, to the First Point Relied upon by Plaintiffs in Error.

The first point relied upon by plaintiffs in error is that under article 256 of the Federal Judicial Code, reading as follows:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States:
>
> "1. All crimes and offenses cognizable under the authority of the United States,"

plaintiffs in error were prosecuted for alleged violations of Act 39 of the Legislature of the State of Louisiana for the year 1921, commonly referred to as the Hood Act, and not for any crime defined by a Federal statute. We respectfully submit that it is elementary that the Federal and State sovereignties are separate and independent; that a prosecution under a State law is a prosecution by a different sovereignty from that of the Federal Government, enforcing the Volstead Act, and therefore conviction under one is no bar to a prosecution under the other, as this Honorable Supreme Court of the United States has definitely held in the following very recent case, wherein this Court said:

> "The amendment (Eighteenth) was adopted for the purpose of establishing prohibition as a national policy reaching every part of the United States and affecting transactions which are essentially local or intrastate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this

is an inseparable incident of independent legislative action in distinct jurisdictions.

"To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, State power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior State laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment but from power originally belonging to the States, preserved to them, by the Tenth Amendment, and now relieved from the restriction hereto arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in Vigliotti *v.* Pennsylvania, 258 U. S., 403; 42 S. Ct., 330; 66 L. Ed., —.

"We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the

same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

"It follows that an act denounced as a crime by both National and State sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to the proceedings by the Federal Government (Barron *v.* City of Baltimore, 7 Pet., 243; 8 L. Ed., 672), and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against the State is not a conviction of the different offense against the United States, and so is not double jeopardy." Citing U. S. *vs.* Lanza, 260 U. S., 377; 43 S. Ct., 141, reversing U. S. *vs.* Peterson, 268 Fed., 864.

Counsel for plaintiffs in error in the brief which has been filed with this Honorable Court seeks to distinguish the principles laid down in the Lanza case from

that involved in the determination of the instant point by differentiating the facts presented in the Lanza case from the facts presented under the point now being discussed.

The pertinent facts in the Lanza case were that the State court was first seized with jurisdiction, and the District Court of the United States maintained a plea to the jurisdiction, based upon double jeopardy, whereas, in the present case, the plaintiffs in error had been previously charged in the District Court of the United States with violations of the National Prohibition Act, and were awaiting trial thereon. Subsequently to having been charged in the United States District Court aforesaid, plaintiffs in error were prosecuted under the Hood Act (Act 39 of the Legislature of Louisiana for the year 1921), for having committed an offense arising out of the same acts upon which the Federal prosecutions were based. Irrespective of whether the prosecution be initiated by the Federal or the State sovereignty, the principle involved remains the same, and if counsel for plaintiffs in error require an authority entirely on all fours in this respect, we would respectfully call to mind the facts presented in the comparatively recent case of Ponzi *vs.* Fessenden *et al.*, 258 U. S., page 254 *et seq.* In the Ponzi case, plaintiff in error had been tried and convicted in the United States courts for the offense of using the mails for the purpose of defrauding. Ponzi was serving a sentence, pursuant to that conviction, in the United States penitentiary, and the State of Massachusetts took out a writ of *habeas corpus*, directed to the master

of the house of correction wherein Ponzi was incarcerated, directing the Federal agent having custody of Ponzi to bring him before the Superior Court of Massachusetts, to stand trial for a violation of the laws of that State. Chief Justice Taft, as organ of this Honorable Court, delivered the opinion in that case, which we here quote at large:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.
>
> "One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more than that. He should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial. He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to convic-

tion of crime against it. *In re* Andrews, 236 Fed., 300; United States *v.* Marrin, 227 Fed., 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it.

"One accused of crime, of course, cannot be in two places at the same time. He is entitled to be present at every stage of the trial of himself in each jurisdiction with full opportunity for defense. Frank *v.* Mangum, 237 U. S., 300, 340; Lewis *v.* United States, 146 U. S., 370. If that is accorded him, he cannot complain. The fact that he may have committed two crimes gives him no immunity from prosecution of either.

"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in Covell *v.* Heyman, 111 U. S., 176, as follows:

" 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States, it is something more. It is a principle of right and of law, and therefore, of necessity.

It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.'

"The Heyman case concerned property, but the same principle applies to jurisdiction over persons as is shown by the great judgment of Chief Justice Taney in Ableman *v.* Booth, 21 How., 506, quoted from, and relied upon, in Covell *v.* Heyman.

"In the case at bar, the Federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no State court could assume control of his body without the consent of the United States. Under statutes permitting it, he might have been taken under the writ of *habeas corpus* to give evidence in a Federal court, or to be tried there if in the same district, Sec. 753, Rev. Stats., or be removed by order of a Federal court to be tried in another district, Sec. 1014, Rev. Stats., without violating the order of commitment made by the sentencing court. *Ex parte* Bollman, 4 Cranch, 75, 98; *Ex parte* Lamar, 274 Fed., 160, 164. This is

with the authority of the same sovereign which committed him.

"There is no express authority authorizing the transfer of a Federal prisoner to a State court for such purposes. Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General. In that officer, the power and discretion to practice the comity in such matters between the Federal and State courts is vested. The Attorney General is the head of the Department of Justice. Rev. Stats., Sec. 346. He is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed. United States *v.* San Jacinto Tin Co., 125 U. S., 273. *In re* Neagle, 135 U. S., 1; Kern River Co. *v.* United States, 257 U. S., 147; Rev. Stats., Sec. 359; Act of June 30, 1906, c. 3935; 34 Stat., 816; Rev. Stats., Sections 360, 361, 357, 364. By Sec. 367, Rev. Stats., the Attorney General is authorized to send the Solicitor General or any officer of the Department of Justice, 'to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.'

"The prisons of the United States and the custody of prisoners under sentence are generally under the supervision and regulation of the Attorney General. Act March 3, 1891, c. 529, 26 Stat., 839. He is to approve the expenses of the transportation of United States prisoners by the marshals under his super-

vision to the wardens of the prisons where they are to be confined, 26 Stat., 839. He makes contracts with managers of State prisons for the custody of United States prisoners. Rev. Stats., Sec. 5548. He designates such prisons. Rev. Stats., Sec. 5546, amended 19 Stat., 88, and 31 Stat., 1450. Release of United States prisoners on parole whether confined in Federal prisons or in State prisons is not made save with the approval of the Attorney General. Act of June 25, 1910, c. 387, 36 Stat., 819. The Attorney General is authorized to change the place of imprisonment of United States prisoners confined in a State prison when he thinks it not sufficient to secure their custody, or on their application, because of unhealthy surroundings, or improper treatment. Rev. Stats., Sec. 5546, as amended 19 Stat., 88, and 31 Stat., 1450. One important duty the Attorney General has to perform is the examination of all applications for pardon or commutation, and a report and recommendation to the President.

"This recital of the duties of the Attorney General leaves no doubt that one of the interests of the United States which he has authority and discretion to attend to, through one of his subordinates, in a State court, under Sec. 367, Rev. Stats., is that which relates to the safety and custody of United States prisoners in confinement under sentence of Federal courts. In such matters he represents the United States and may on its part practice the comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the Fed-

eral courts or endanger the prisoner. Logan *v.* United States, 144 U. S., 263.

"Counsel for appellant relies on Sec. 5539, Rev. Stats., which directs that when any criminal sentenced by a Federal court is imprisoned in the jail or penitentiary of any State or Territory 'such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory.' This section, it is said, prevents the Attorney General or any other Federal officer from ordering the superintendent of a State prison to produce a Federal prisoner for trial or testimony. But it is clear that the section has no such effect. The section is only one of many showing the spirit of comity between the State and national governments in reference to the enforcement of the laws of each. To save expense and travel, the Federal Government has found it convenient with the consent of the respective States to use State prisons in which to confine many of its prisoners, and the Attorney General is the agent of the Government to make the necessary contracts to carry this out. In order to render the duty thus assumed by the State governments as free from complication as possible, the actual authority over, and the discipline of, the Federal prisoners while in the State prison are put in the State prison authorities. If the treatment or discipline is not satisfactory, the At-

torney General can transfer them to another prison, but while they are there, they must be as amenable to the rules of the prison as are the State prisoners. But this does not have application to the procedure or the authority by which their custody may be permanently ended or temporarily suspended.

"The authorities, except when special statutes make an exception, are all agreed that the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. One of the best-considered judgments on the subject is Rigor *v.* State, 101 Md., 465. The Supreme Court of Maryland said (p. 471):

" 'The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'

"Delay in the trial of accused persons greatly aids the guilty to escape because witnesses disappear, their memory becomes less accurate and time lessens the vigor of officials charged with the duty of prosecution. If a plea of guilty and imprisonment for one offense is to postpone trial on many others, it furnishes the criminal an opportunity to avoid the full expiation of his crimes. These considerations have led most courts to take the same view as that expressed in the case just cited. Other cases are State *v.* Wilson, 38 Conn., 126; Thomas *v.* People, 67 N. Y., 218, 225; Peri *v.* People, 65 Ill., 17; Commonwealth *v.* Ramunno, 219 Pa. St., 204; Kennedy *v.* Howard, 74 Ind., 87; Singleton *v.* State, 71 Miss., 782; Huffaker

v. Commonwealth, 124 Ky., 115; Clifford *v.* Dryden, 31 Wash., 545; People *v.* Flynn, 7 Utah, 378; *Ex parte* Ryan, 10 Nev., 261; State *v.* Keefe, 17 Wyo., 227, 252; *Re* Wetton, 1 Crompt. & J., 459; Regina *v.* Day, 3 F. & F., 526.

"It is objected that many of these cases relate to crimes committed in prison during service of a sentence. The Maryland case did not, nor did some of the others. But the difference suggested is not one in principle. If incarceration is a reason for not trying a prisoner, it applies whenever and wherever the crime is committed. The unsoundness of the view is merely more apparent when a prisoner murders his warden than when he is brought before the court for a crime committed before his imprisonment. It is the *reductio ad absurdum* of the plea.

"Nor, if that be here important, is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite *v.* Commonwealth, 11 Metc., 581, 585, an opinion by Chief Justice Shaw; *Ex parte* Ryan, 10 Nev., 261, 264; Thomas *v.* People, 67 N. Y., 218, 226.

"But it is argued that when the prisoner is produced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the State court cannot try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. State *v.*

> Wilson, 38 Conn., 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.
>
> "The question must be answered in the affirmative."

The power of the States over intoxicating liquors does not now flow from the Eighteenth Amendment, as full regulation of the manufacture and use of intoxicating liquors was the prerogative of the States under their reserved police powers, and this power has been parted with only to the extent indicated by the Eighteenth Amendment, and State laws tending toward the enforcement of the Eighteenth Amendment still rest on the authority of the State just as they did before the amendment. This being so, the State laws and the Federal laws as to intoxicating liquors emanate from different sovereignties. They denounce different offenses; the one offense against the State, the other against the United States. It is clear that the same act may be an offense against the laws of two governments, may be punished by both, and that a plea of former jeopardy in a tribunal of one government is not available in a tribunal of the other. The same act may constitute an offense equally against the United States and the State, and therefore a conviction in the Federal court for possession and transportation of

intoxicating liquors under the Federal law is no defense to a prosecution for the same act under the State law. State *v.* Rhodes (Tenn.), 242 S. W., 642; 22 A. L. R., 1544.

In U. S. *vs.* Holt, 270 Fed., 639, the court said:

> "It was not necessary for the Supreme Court in the liquor cases to exactly define the 'concurrent power' of the Eighteenth Amendment. Nor is it in this case. It is sufficient and obvious, in view of the conclusions reached by the court, that any interpretation is excluded which would deny to either the Nation or the State the power to punish such acts as are charged against defendant here. As applied in this case, the words in the second section of the amendment are not to be extended beyond the effect given to such provisions as the one quoted above, which are to be found in several of the acts of Congress. 'Nothing in the act contained shall be held to take away or impair the jurisdiction of the several States under the laws thereof.' When the 'concurrent power' is thus restricted to its real purposes and significance, it follows that the conviction of the defendant in the State court cannot prevent his prosecution in this court; this upon principles long settled and established, and authoritative precedents long acquiesced in. The last expression of the Supreme Court is found in Gilbert *v.* Minnesota, 254 U. S., 325; 41 S. Ct., 125; 65 U. S., L. Ed., —, decided December 13, 1920: 'The same act * * * may be an offense or transgression of both (the duty of a citizen to the State and the Nation) and both may punish it without a conflict of their sovereignties.' Nu-

merous cases are cited, beginning with Morse *v.* Illinois, 14 How., 13; 14 U. S., L. Ed., 306, and terminating with Halter *v.* Nebraska, 205 U. S., 34; 27 S. Ct., 419; 51 U. S., L. Ed., 696; 10 Ann. Cas., 525. A study of the cases can leave no doubt of the soundness and wisdom of the settled law that, where both sovereignties may punish, a conviction by one is not a bar to punishment by the other.

"Still the matter of the sentence imposed by the State court should be considered and if the defendant will plead guilty a nominal sentence will be imposed. United States *v.* Holt, 270 Fed., 639."

It might be noticed in passing that if the sovereignty of the Federal Government was outraged by the plaintiffs in error being prosecuted in the State courts, while they were awaiting trial in the Federal courts, these plaintiffs in error had no personal right to urge this as a plea in bar, and the sole right to object to the prosecution in the State courts was vested in the Federal Government, represented by the Attorney General of the United States, and his duly authorized assistants.

Reply of the State of Louisiana, Defendant in Error, to the Second and Third Points Relied upon by Plaintiffs in Error.

The second and third points relied upon by plaintiffs in error may be discussed together, because of the fact that they both are determinable by the same prin-

ciple of law. In the cases at bar, the Supreme Court of Louisiana has construed Act 39 of the Legislature of the State of Louisiana for the year 1921 with reference to the State Constitution and the Revised Statutes (980) of the State of Louisiana. That court's finding that Act 39 of the Legislature of Louisiana for the year 1921 and Revised Statutes of Louisiana (Section 980) are to be taken together and applied conjunctively is a conclusive judgment and, we respectfully submit, not a matter properly within the final appellate jurisdiction of this Honorable Supreme Court.

In support of our position above, we cite the following cases, holding that where no Federal question is involved the Supreme Court of the United States cannot review a decision of a State court with respect to a question arising under the Constitution of the State. Green *vs.* Frazier, 253 U. S., 233; 64 L. Ed., 878; Fort Smith Lumber Co. *vs.* Ark., 251 U. S., 532; 64 L. Ed., 376; Crane *vs.* Campbell, 245 U. S., 304; 60 L. Ed., 304; Ohio *vs.* Hildebrant, 241 U. S., 565; 60 L. Ed., 1172; John *vs.* Paullin, 231 U. S., 583; 58 L. Ed., 381; West *vs.* La., 194 U. S., 258; 48 L. Ed., 965; Murray *vs.* La., 163 U. S., 101.

This Honorable Court has further held in the following cited decisions that a decision of a State Supreme Court, construing the statutes of the State, is not subject to review by the Supreme Court of the United States. American Mfg. Co. *vs.* St. Louis, 250 U. S., 459; 63 L. Ed., 266; Danziger *vs.* Cooley, 248 U. S., 319; 63 L. Ed., 266; Wells *vs.* State, 248 U. S., 165; 63 L.

Ed., 190; Rogers *vs.* Hennican Co., 240 U. S., 184; 60 L. Ed., 594; King *vs.* W. Va., 216 U. S., 92; 54 L. Ed., 396; O'Connor *vs.* Texas, 202 U. S., 501; 50 L. Ed., 1120; Price *vs.* Pa. R. R., 113 U. S., 218; — L. Ed., 980; West *vs.* La., 194 U. S., 258; 48 L. Ed., 965.

We therefore earnestly feel that there is but one possible Federal question suggested by the assignments of error taken in this case, and that is the question discussed under part 1, whether Section 256 of the Federal Judicial Code operates to deprive the States of their inherent right to prosecute violations of their laws. We feel that this is well-trodden ground, having been particularly well settled in the recent expression of this Court contained in the Lanza case, and we therefore respectfully pray that the judgment and sentence of the courts *a qua* be affirmed and this appeal be dismissed at plaintiffs' cost.

Respectfully submitted,

PERCY SAINT,
Attorney General.
PERCY T. OGDEN,
Assistant Attorney General.

E. R. SCHOWALTER,
Assistant to Attorney General,
JOHN J. ROBIRA,
District Attorney,
Of Counsel.

Certificate of Service.

The undersigned counsel for defendant in error hereby certify that they have served a copy of the within brief upon T. Arthur Edwards, counsel for plaintiffs in error, by depositing the said brief in the United States mail, postage fully paid, this 24th day of September, 1926.

PERCY T. OGDEN,
E. R. SCHOWALTER,
Counsel for Defendant in Error.